Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1995

R.J. Steichen & Company and John E. Feltl,

Petitioners,

vs.

Brian L. Honn,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act ("FAA"), 9 U.S.C. §16(a), governs the right to appellate review of an order for vacatur, remand and rearbitration of a National Association of Securities Dealers arbitration award and preempts conflicting state law that precludes appellate review of an order for vacatur, remand and rearbitration.

LIST OF PARTIES

All parties to this Petition are listed in the caption.

RULE 29.1 LIST

There is no parent or subsidiary company to list.

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

INTRODUCTION

Petitioners, R.J. Steichen & Company and John E. Feltl, (collectively referred to as "Steichen") pray that this Court issue a Writ of Certiorari to review the orders of the Minnesota Supreme Court and the Minnesota Court of Appeals refusing to review an order of the Hennepin County District Court vacating and remanding for rearbitration a National Association of Securities Dealers ("NASD") arbitration award.

OPINIONS BELOW

On September 2, 1994 the NASD served an arbitration award on Steichen and Respondent Brian L. Honn ("Honn"), which is included in the Appendix as Exhibit A. (A-1 through A-6). The Hennepin County District Court denied Steichen's motion for confirmation of the award and granted Honn's motion for vacatur and remand for rearbitration in a memorandum and order dated January 20, 1995, which is included in the Appendix as Exhibit B. (A-7 through A-14). Steichen appealed the order denying confirmation and granting vacatur and remand for rearbitration to the Minnesota Court of Appeals on February 2, 1995 and on February 8, 1995 the Court of Appeals issued an order citing Minn. Stat. §572.26 subd. 1(5) as a basis for questioning appellate jurisdiction, which is included in the Appendix as Exhibit C. (A-15 through A-17). On March 7, 1995 the Minnesota Court of Appeals issued an order holding that the Federal Arbitration Act (FAA) 9 U.S.C. §16(a) "does not control the process by which substantive rights pertaining to arbitration are reviewed in state court", which is included in the Appendix as Exhibit D. (A-18 through A-20). On April 5, 1995 Steichen petitioned the Minnesota Supreme Court for review of the decision of the Court of Appeals and on April 27, 1995 the Minnesota Supreme Court issued an order denying Steichen's petition for further review, which is included in the Appendix as Exhibit E. (A-21).

STATEMENT OF JURISDICTION

The order of the Minnesota Supreme Court denying discretionary review was entered on April 27, 1995. This Petition for Writ of Certiorari is filed within ninety days of that date. U.S. Supreme Court Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C §1257 to review the order of the Minnesota Supreme Court by Writ of Certiorari.

Steichen disputes the validity of Minn Stat. §572.26 subd. 1(5), that precludes appellate review of the vacatur and remand for rearbitration of a NASD arbitration award; the validity of Minn. Stat §572.26 subd. 1(5)[1] is questionable under the Supremacy Clause and under the FAA, 9 U.S.C. §16(a). This Court found appellate jurisdiction[2], for example, in *Volt Information Sciences, Inc. v. Leland Stanford, Jr. U.*, 489 U.S. 468 (1989), when the validity of a California statute was drawn in question as repugnant to federal law. In *Volt* the California Court of Appeals sustained California law notwithstanding its potential conflict with the FAA and invalidity under the Supremacy clause. 489 U.S. at 473 n.4. This case resembles *Volt* albeit different provisions of the FAA are implicated.

The jurisdictional requirement of finality contained in 28 U.S.C. §1257 is also satisfied in this case. The Minnesota Supreme Court's final determination that no federal right of appellate review of the vacatur is "final" because requiring rearbitration before appellate review renders that right a nullity. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 47-48 (1987) ("where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had....")(*quoting Cox Broadcasting v. Cohn*, 420 U.S. 469, 481 (1975)); *N.Y. Times v. Jascalevich*, 439 U.S. 1317, 1318-19 (1978). Put differently, Steichen asserts that the FAA confers a substative right of appellate review of an order for vacatur, remand and

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[1] And all other similar versions of §19 of the Uniform Arbitration Act. *See Infra* at 6 n.5.

[2] Jurisdiction in *Volt* was appellate and premised on 28 U.S.C. §1257(2) (1988) which has since been amended. 489 U.S. at 473 n.4 Jurisdiction in this case can only be via certiorari; nevertheless, the standards for certiorari under the current version of 28 U.S.C. §1257 are parallel to those standards that provided a basis for this Court's appellate jurisdiction in *Volt*.

rearbitration and the Minnesota appellate courts have decided that Steichen has no such right.

STATUTES INVOLVED

The FAA, 9 U.S.C. §16(a) provides as follows:

> An appeal may be taken from –
>
> (1) an order –
>
> (A) refusing a stay of any action under §3 of this title,
>
> (B) denying a petition under §4 of this title to order arbitration to proceed,
>
> (C) denying an application under §206 of this title to compel arbitration,
>
> (D) confirming or denying confirmation of an award or partial award, or
>
> (E) modifying, correcting or ***vacating*** an award;

9 U.S.C. §16(a)[3] (Emphasis added).

The FAA also provides in pertinent part that as follows:

> If the parties in their agreement have agreed that a ***judgment of the court*** shall be entered upon the award pursuant to the arbitration, and shall ***specify the court***, then at any time

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[3] Section 16 of the FAA was enacted in 1988 as part of the Judicial Improvements and Access to Justice Act Pub.L.No. 100 - 702, Title X, §1019(a), 102 Stat.4671 (1988). Presumably, given the similarity between the UAA and the FAA, Congress was cognizant of the inconsistency between Section 16 of the FAA, 9 U.S.C. §16(a)(1)(E) and Section 19 of the UAA.

> within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such and order unless the award is vacated, modified or corrected as prescribed in §§10 and 11 of this title. ***If no court is specified in the agreement of the parties then such application may be made to the United States Court in and for the district within such an award was made.***

9 U.S.C. §9 (Emphasis added).[4]

The Minnesota Uniform Arbitration Act ("MAA") provides in pertinent part as follows:

> An appeal may be taken from:
>
> (1) An order denying an application to compel arbitration made under §572.09;
> (2) An order granting an application to stay arbitration made under §572.09 (b);
> (3) An order confirming or denying confirmation of an award;
> (4) An order modifying or correcting an award;
> (5) ***An order vacating an award without directing a rehearing;*** or

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[4] Notwithstanding the last sentence contained in 9 U.S.C. §9, the FAA has never been construed to provide an independent basis for federal court jurisdiction. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983).

(6) A judgment or decree in or pursuant to the provisions of this chapter.

Minn. Stat. §572.26 subd. 1[5] (Emphasis added).

Minn. Stat. §§572.18-.25 govern post-arbitration motion practice and do not specify which court has jurisdiction. Minn. Stat. §572.25 provides that venue is appropriate in "the court of the county in which the arbitration hearing shall be held...." Finally, Minn. Stat. §572.24 defines the term court to mean "***any court of competent*** jurisdiction of this state." (Emphasis added).

STATEMENT OF CASE

Honn initiated a NASD[6] arbitration against Steichen on June 21, 1993. (*See* Appendix at A-2). Honn's Statement of Claim asserted common law claims of fraud, breach of contract, promissory estoppel, defamation, interference with prospective business advantage, civil conversion, violation of the NASD rules of fair practice and failure to pay commissions pursuant to Minn. Stat. §181. 145. (*Id.* at A-2 through A-3). Almost one year later,

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[5] The MAA is derived from the Uniform Arbitration Act (UAA) which was drafted in 1955, and is enacted in some form in at least thirty-four (34) of the fifty (50) states and in the District of Columbia. Minnesota's version of the UAA was enacted in 1957. *See* 1957 Minn. Laws Chapter 633.

[6] The NASD is a federal self-regulatory organization ("SRO") established pursuant to the 1938 Maloney Act amendments to the 1934 Act. 15 U.S.C. 78 (o)3. The NASD arbitration rules are subject to the approval of the Securities and Exchange Commission ("SEC") under Section 19 of the 1934 Act. 15 U.S.C. 78 (s)(d)(1) and 17 C.F.R. 240.19b-4. *See also Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 234 (1987)("In the exercise of its ***regulatory authority***, the SEC has ***specifically approved*** the arbitration procedures of the New York Stock Exchange, the American Stock Exchange and the NASD....")(emphasis added).

on June 7, 8, and 9th and 16th of 1994, a three member panel appointed by the NASD heard the arbitration. (*Id.* at A-2). Honn alleged damages and requested an award in excess of one million dollars.

On September 2, 1994, the panel awarded Honn $7,312.50 for his claim of unpaid commissions under Minn. Stat. §181.145. (*Id.* at A-4 through A-5). The panel denied all of Honn's other claims. (*Id.*). Honn moved to vacate while Steichen moved to confirm the award in Hennepin County District Court. On December 15, 1994 the Honorable Delila F. Pierce heard oral arguments; she filed her order vacating the arbitration award on January 20, 1995.

Honn's motion to vacate asserted that the testimony of an NASD official, who had no professional or personal connection to the arbitrators, resulted in evident partiality under Minn. Stat. §572.19 subd. 1(2) ***and*** 9 U.S.C. §10(b). (A-9 through A-11). Honn also argued that nearly every other statutory basis contained in the MAA and the FAA supported vacatur. (*Id.*) In support, Honn offered the following: (a) His attorney's affidavit containing her opinion testimony; (b) his own affidavit replete with hearsay; (c) a partial transcript of approximately five minutes of the three and one-half day hearing; and (d) other assorted documents. Honn and Steichen both relied upon the FAA and cases interpreting that statute with respect to the substantive legal issues argued before Judge Pierce. In addition, Judge Pierce also relied upon the FAA in vacating and remanding the award for rearbitration and ordered a new panel. (*Id.* at A-11).

In vacating and ordering rearbitration of Honn's claims, Judge Pierce did not specifically identify the state or federal statutory provisions that provided a court with the authority to vacate an arbitration award under a "fundamentally fair"

standard.[7] (A-44). Judge Pierce's order implied that evident partiality (as opposed to actual bias)[8] existed even though there was no showing of any nexus between the "facts" allegedly providing a basis for a finding of evident partiality and the arbitrators.

On February 2, 1995 Steichen appealed the Order denying confirmation of the award and vacating and remanding this case to a different panel for arbitration.[9] Steichen's Statement of Case referenced the FAA and MAA as "statutes at issue".

On February 8, 1995 the Minnesota Court of Appeals issued an Order citing Minn. Stat. §572.26 subd. 1(5) as a basis for questioning jurisdiction for this appeal. (A-40). The parties filed jurisdictional memoranda on February 21, 1995 (A-42); Steichen contemporaneously filed a Petition for Discretionary Review. (A-49). In response to the Minnesota Court of Appeals' jurisdictional inquiry, Steichen asserted that it should not be forced to rearbitrate Honn's claims before appellate review of the vacatur and that to the extent the MAA limited appellate review of vacatur, the FAA preempted the MAA. On March 7, 1995, the Minnesota Court of Appeals issued an Order holding that the FAA "does not control the process by which substantive rights pertaining to arbitration are reviewed in state court. *See Xaphes v. Mowry*, 478 A.2d 299, 301 (Me. 1984); *Balton v. Green*, 801

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[7] Judge Pierce held the judicial standard of review of arbitration procedures was whether a party was denied a fundamentally fair hearing. (A-14)

[8] The distinction between evident partiality and actual bias is best described in *Schmitz v. Zilveti*, 20 F.3d, 1043, 1047 (9th Cir. 1994). *See also Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 147 (1968); *Peoples Sec. Life Ins. v. Monumental Life Ins.*, 991 F.2d 141, 146 (4th Cir. 1993).

[9] Judge Pierce ordered rearbitration by non-Minnesota arbitrators; this aspect of the trial court's ruling is anomalous inasmuch as Honn never asserted, anywhere in his motion for vacatur, that the fact that the arbitrators were Minnesota residents was a basis for partiality.

S.W.2d 923, 930 (Tex. App. 1990)." (*See* Appendix at A-19). On April 27, 1995, the Minnesota Supreme Court denied Steichen's Petition for Further Review.

REASONS FOR GRANTING THE WRIT

Arbitration is assuming ever increasing prominence as a means of resolving commercial disputes, particularity in the securities[10], construction[11], and employment[12] arenas. Under this Court's previous decisions, neither Steichen nor Honn had any choice of fora for resolving their dispute. In *Shearson / American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) and its progeny,[13] Steichen was obligated under the FAA and the bylaws of the NASD to arbitrate Honn's claims. Similarly, this Court's decisions in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Perry v. Thomas*, 482 U.S. 483 (1987), dictate that Honn was obligated to arbitrate his claims against Steichen. *See also Johnson v. Piper Jaffray, Inc.*, 530 N.W.2d 790, 797-98

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[10] In 1993, more than 6,500 securities arbitrations were filed. Masucci, NASD Arbitration 1994, (Minnesota Institute of Legal Education March 10, 1995). Of these, 83% were with the NASD. The NASD expects these numbers to continue increasing. *Id.* In fact, the number of securities cases submitted to arbitration has increased 250% annually since 1987 and a parallel increase has occurred in commercial arbitration since 1972. Pierce, *The Federal Arbitration Act: Conflicting Interpretation of its Scope*, 61 CIN.L. REV. 623, 623 (1992).

[11] In 1993, the AAA heard 4,098 construction arbitration disputes with total claims and counterclaims of almost 1 billion dollars. *See* Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 HOFSTRA L. REV. 137, 138 n.6 (1994).

[12] In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) this Court found an agreement to arbitrate age discrimination claims in a securities registration application.

[13] *See also Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 482-84 (1989) (holding '33 Act claims arbitrable).

(Minn. 1995). With the growing use of arbitration as a mandatory or an elective method of dispute resolution, more and more courts are confronted with issues relating to confirmation, modification and vacatur of arbitration awards. This case represents the post-arbitration conundrum courts and counsel face because of the absence of any guidance as to what statutes (federal or state) govern the enforcement and appellate review of arbitration awards involving interstate commerce.

A Writ of Certiorari should be granted in this case for two reasons. First, while this Court has held that the FAA preempts state law that discourages arbitration, this Court has never addressed the preemptive effect of the FAA in the context of post-arbitration procedure. This Court's past decisions construing the FAA were confined to pre-arbitration procedure and to the enforcement of arbitration agreements.[14] Furthermore, neither the FAA, the UAA, or Submission Agreements used to submit matters to arbitration dictate which law applies to enforcement of and appellate review of aribtration awards. Second, an explicit conflict exists between the MAA (and obviously all other jurisdictions that have adopted the UAA) and the FAA that is not merely academic or episodic. This Court should clarify the

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[14] The vast majority of this Court's decisions relating to FAA preemption of state law concern the choice between litigation or arbitration. *See, e.g., Allied-Bruce Terminix Co., Inc. v. Dobson.*, 115 S.Ct. 834 (1995) (state courts cannot apply statute that invalidates arbitration agreements); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (FAA applied to enforce agreement to arbitrate contained in U-4); *Volt Information Sciences v. Leland Stanford, Jr. U.*, 489 U.S. 168 (1989) (stay of arbitration pending outcome of litigation); *Perry v. Thomas*, 482 U.S. 483 (1987) (statutory claim for wages under California labor law conflicted with arbitration clause); *Southland v. Keating*, 465 U.S. 1 (1984) (conflict between contractual arbitration clause and California Franchise Investment Law); *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1 (1983) (attempt to avoid or stay arbitration). This case does not involve such a conflict but rather concerns the integrity and enforcement of an arbitration award.

relationship between the UAA and the FAA and parties' rights in connection with post-arbitration practice in state and federal court.

1. Neither the contract nor the statutes involved provide any guidance as to which law applies.

This Court's decision in *Volt* found that the FAA did not preempt the California arbitration law. 489 U.S. at 478-79. In *Volt* this Court looked to the arbitration agreement itself to decide which law the parties intended to apply to the arbitration. *Id.* at 479. This case, however, raises the issue of what law applies in the absence of a contractual choice of law provision and in the absence of a statutory provision. In the end, this Court's decisions mandated arbitration in this and other NASD cases but neither the arbitration agreement, this Court's decisions, nor federal or state law provide specific guidance as to the rights pertaining to appellate review of arbitration awards.

The Uniform Submission Agreement generally used in NASD cases does not prescribe which law governs post-arbitration motion practice.[15] For instance, the agreement in this case provided as follows:

> 1. The undersigned parties hereby submit the present matter in controversy, as set forth in the attached

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[15] Neither does the submission agreement used in AAA securities or construction disputes. In construction disputes, however, the contract containing the mandatory arbitration clause also typically contains a choice of law provision. In the context of choosing between Texas and Minnesota, for example, such a provision would not be critical because both states are UAA jurisdictions. But the choice of law provision contained in such contracts does not resolve the issue discussed in Justice Brennan's dissent in *Volt*. 489 U.S. at 488. More specifically, these choice of law provisions resolve state law conflicts, but do not resolve a conflict between state and federal law. *Id.*

statement of claim, answers, and all related counterclaims and/or third party claims which may be asserted, to arbitration in accordance with the Constitution, Bylaws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organizations.

2. The undersigned parties hereby state that they have read the procedures and rules of the sponsoring organization relating to arbitration.

3. The undersigned parties agree that in the event a hearing is necessary, such hearing shall be held at a time and place as may be designated by the Director Arbitration or the arbitrator(s). The undersigned parties further agree and understand that the arbitration will be conducted in accordance with the Constitution, Bylaws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organization.

4. The undersigned parties further agree to abide by and perform any award(s) rendered pursuant to the this Submission Agreement and further agree that a ***judgment*** and any interest due thereon, may be entered upon such award(s) and, for these purposes, the undersigned parties hereby voluntarily consent to submit to ***the jurisdiction*** which ***may properly*** enter such judgment.

5. **IN WITNESS WHEREOF**, the parties hereto have signed and acknowledge the foregoing Submission Agreement.

(Emphasis added).

In contrast to cases like *Volt*, the language of the contract or uniform submission agreement does not generally provide guidance to courts or parties involved in post NASD arbitration motion practice[16]. Presumably, because this Court has held that many of the disputes that arise in the securities industry must be arbitrated under the FAA, then the FAA should govern appellate review of post-arbitration motion practice.

Nevertheless, neither the FAA nor the UAA clearly prescribe the applicable governing law. *See supra* at 4-6. The general philosophy of the UAA is to minimize judicial involvement. This philosophy considers a remand to rearbitration as interlocutory and therefore not reviewable. The FAA, however, recognizes that vacatur and remand to a different arbitration panel favors litigation, not arbitration, because vacatur and remand set aside a final arbitration award. As the Fifth Circuit Court of Appeals observed in *Forsythe International, SA v. Gibbs Oil Co.*, 915 F.2d 1017 (5th Cir. 1990):

> While the district court's order commanded further arbitration, it also nullified the decision of an arbitration panel. If an order remanding the case to a different panel renders a vacatur unreviewable, parties to an arbitration could never determine whether the district court acted within its narrow statutory limits governing vacatur of the original award. ***Such a result would disserve the policies that promote arbitration and restrict judicial review of awards.***

915 F.2d at 1020 (emphasis added, footnote omitted).

This strong federal policy favoring arbitration conflicts with the general principle disfavoring piecemeal litigation. MacNeil et al, IV FEDERAL ARBITRATION LAW §43.5.2 at 43.56

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[16] In *Volt* a specific choice of law clause was contained in the contract. 489 U.S. at 471-76.

(1994). When the issue of appealability is inextricably intertwined with a substantive issue, great advantages exist in "candidly deciding the merits rather than toying with them in a jurisdictional minuet." *Locals 2222, 2320 - 2327, Int'l Brotherhood of Electrical Workers v. New England Tel. & Tel. Co.*, 628 F.2d 644, 646 (1st Cir. 1980)(LMRA §301)(citation omitted). This case and others like it that are certain to arise require a resolution of this conflict which is a direct result of the FAA and this Court's decisions interpreting the FAA.

2. A direct conflict exists between the FAA and UAA.

The conflict between the FAA and the UAA's provision that renders vacatur with remand nonappealable was directly addressed in *Atlantic Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276 (5th Cir. 1994). In *Atlantic* the plaintiff brought suit in state court to modify, correct and confirm an arbitration award. 11 F.3d at 1278. The defendant removed the case to federal district court on the basis of diversity jurisdiction and counterclaimed for vacatur and remand. *Id.* The trial court found the award unenforceable and remanded the matter for arbitration before a new panel. *Id.*

On appeal, it was asserted that the Fifth Circuit lacked appellate jurisdiction because the contract containing the arbitration agreement provided that the "arbitration award 'shall be reviewable only as provided for under the Uniform Arbitration Act.'" 11 F.3d at 1279 n.5.[17] The Fifth Circuit rejected this argument relying on *Southland* and held that the provisions of the FAA governed its jurisdiction even in a diversity suit.

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[17] Under the UAA and MAA, an order for vacatur and remand is not appealable. *See* §19 UAA; Minn. Stat. §572.26 subd. 1(5).

> If an arbitration agreement is within the coverage of the FAA, its provisions are ***applicable in state*** as well as federal court. (citations omitted).
>
> * * *
>
> Furthermore, the FAA governs judicial review of arbitration proceedings ***notwithstanding any choice of law provision or state law to the contrary.***

11 F.3d 1280 (emphasis added) (*citing Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 243-44 (5th Cir. 1986) and *Northern Illinois Gas Co. v. Airco Industries Gases*, 676 F.2d 270, 274-75 (7th Cir. 1982)).[18] In the final analysis, *Atlantic* represents the confusion that *Volt* and *Southland* created and the problems that Justice Brennan identified in his dissent in *Volt*. 489 U.S. at 488. Arguably, *Atlantic* was decided wrongly under this Court's reasoning in *Volt* which would have held that the choice of law provision contained in the contract governed. Nevertheless, the *Atlantic* decision failed to cite *Volt* and instead relied on *Cone* and *Southland* which were both decided before *Volt*. 11 F.3d at 1280.

Because this Court has held that the FAA is a body of substantive law to be applied in state and federal courts and that the FAA governs agreements to arbitrate contained in U-4 applications, then so too must the FAA, when applied in state court, govern the appellate review of judicial vacatur of arbitration awards. Failure to clarify and harmonize the express statutory conflict that exists could give rise to post-arbitration motion practice forum shopping.

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[18] The *Atlantic* opinion also cited to Wright & Miller who observe that: "[E]ven in a diversity suit or an action in state court if a maritime transaction or one in interstate or foreign commerce is involved, the substantive rules contained in the [FAA]...*are to be applied regardless of state law*." 13 B C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, §3569 (2nd Ed. 1984) (emphasis added).

The *Atlantic* decision, as it relates to 9 U.S.C. §16, conflicts with the Texas Court of Appeals decision in *Balton v. Green*, 801 S.W.2d 923 (Tex. App. 1990) and the Maine Supreme Court's decision in *Xaphes v. Mowry*, 478 A.2d 1299 (Me. 1984). Notwithstanding the language in *Southland* that the substantive law contained in the FAA applies in both state and federal court, appellate courts in Maine, Texas, and, now, Minnesota have held that 9 U.S.C. §16(a) is merely procedural. *See Xaphes*, 478 A.2d at 301; *Balton*, 801 S.W.2d at 930. *But see A.G. Edwards & Sons, Inc. v. Clark*, 558 So.2d 358 (Ala. 1990) (holding that FAA, 9 U.S.C. §16, applied to an order denying a stay of litigation and refusing to compel arbitration and that such an order was appealable).[19] Thus, not only is there an explicit conflict between the FAA and the UAA as enacted in over two-thirds of the states, but there is a conflict between federal and state courts as to the applicability of 9 U.S.C. §16(a) in state court.

The interpretation of 9 U.S.C. §16 has also given rise to a conflict between the Second, Third and Fifth Circuits. In *Landy Michael Realty Corp. v. Local 32B - 37J*, 954 F.2d 794 (2nd Cir. 1992), the vacatur and remand of the damages portion of an arbitration award was held to be nonappealable regardless of the unqualified language contained in 9 U.S.C. §16(a). 945 F.2d at 797.[20] *But see Virgin Islands Housing Authority v. Coastal Gen. Const.*, 27 F.3d 911, 914 (3rd Cir. 1994) (following Fifth Circuit's decisions in *Atlantic* and *Forsythe*)

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[19] Alabama is not a UAA jurisdiction.

[20] *Landy* relied in part, on *Shearson Loeb Rhoades, Inc. v. Much*, 754 F.2d 773 (7th Cir. 1985). 954 F.2d at 797. But *Much* was decided before 9 U.S.C. §16 was enacted and therefore has no precedential value. Moreover, *Much* suggested in *dicta* that, as in this case, vacatur and remand on the basis of partiality was final, not interlocutory, and therefore appealable. 754 F.2d at 778 n.4.

CONCLUSION

The standards by which arbitration awards are measured, as well as the timing of that judicial measurement, directly affects the integrity of the arbitral process. Having fully embraced arbitration as an effective and efficient means of resolving disputes, after years of skepticism, this Court must define and clarify the rights related to judicial enforcement of and appellate review of arbitration awards.

The notion that vacatur and remand of an arbitral award without further appellate review fosters and encourages the use of arbitration as a dispute resolution tool is superficially appealing but logically nonsensical. Obviously, it is not favorable to arbitration of disputes arising in interstate commerce if the means of judicial review and enforcement of such awards is dependant upon the procedural vagaries of a particular jurisdiction. Characterizing 9 U.S.C. §16(a) as procedural, when this Court has previously held that the FAA is a body of substantive law, imposes the problems resolved in *Erie v. Tompkins*, 304 U.S. 64 (1938) upon the arbitral process. In sum, this case gives this court an opportunity to provide guidance to state and federal courts and to reconcile and harmonize this Court's holdings in *Volt* and *Southland*.

Based on the foregoing, Steichen respectfully requests this Court to issue a Writ of Certiorari to the Minnesota Supreme Court.

Dated: July 24, 1995

Steven E. Rau
701 Fourth Avenue South
Suite 500
Minneapolis, Minnesota 55415

COUNSEL FOR PETITIONERS
R.J. STEICHEN & COMPANY
AND JOHN E. FELTL

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EXHIBIT A

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Name of Claimant

Brian L. Honn

93-02443

and

Name of Respondents

R.J. Steichen and Company and John E. Feltl

REPRESENTATION OF PARTIES

Claimant, Brian Honn ("Honn") was represented at the hearing by Rebecca E. Bender, Esq. of Rebecca E. Bender & Associates P.A., Minneapolis, Minnesota.

Respondents, R.J. Steichen and Company ("Steichen") and John E. Feltl ("Feltl") were represented at the hearing by Steven E. Rau, Esq. of Maun & Simon, Minneapolis, Minnesota.

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

Honn also alleged that Steichen and Feltl committed the following violations: violation of Min. Stat. Section 181.145; breach of contract, misrepresentation; promissory estoppel; defamation; interference with business; and civil conversion/violation of NASD Rules of Fair Practice.

Respondents Steichen and Feltl generally denied the allegations set forth in the Statement of Claim. Steichen and Feltl stated that they did not make any misrepresentations and did not unlawfully withhold any money or securities from Honn. Steichen and Feltl also stated that training was offered to Honn, but was not mandatory. Steichen and Feltl stated that the U-5 was not defamatory.

RELIEF REQUESTED

Claimant Honn requested the following: commission amounts, damages due to Respondents breach of contract, damages plus penalties pursuant to Minn. Stat. Sec. 181.145, damages caused by the negligent and/or fraudulent misrepresentations of Respondents, damages based on defamation, damages on a promissory estoppel theory of liability, damages due to Respondents civil conversion in violation of the NASD Rules of Fair Practice, damages due to Respondent's interference with his business; punitive damages, attorney's fees, pre-judgment interest, post-judgment interest, costs, filing and hearing fees and other disbursements, and other further or different relief as the panel deems just and equitable.

Respondents Steichen and Feltl requested that the Statement of Claim be dismissed with prejudice, and that they be awarded their costs and expenses, including attorney's fees and such other further relief as the panel may deem just and equitable.

4. Respondent R.J. Steichen shall be and hereby is liable for, and shall pay to the Claimant, damages for penalties in the amount of Two Thousand, Four Hundred Thirty Seven Dollars and Fifty Cents ($2,437.50) for violation of Minn. Stat. Sec. 181.145 as set forth in claimant's requested relief;

5. Respondent R.J. Steichen shall be and hereby is liable for, and shall pay to the Claimant, attorney's fees in the amount of Two Thousand, Four Hundred Thirty Seven Dollars and Fifty Cents ($2,437.50). The panel awarded attorney's fees under the authority of Minn. Stat. Sec. 181.145;

6. Respondent R.J. Steichen shall, in addition to the above, promptly cause to be prepared and filed with the N.A.S.D., CRD amendments to Claimant's form U-5 in accordance with the Rules of Fair Practice and consistent with factual information known by Respondent R.J. Steichen;

7. All other requests not specifically provided for herein are denied by the panel;

8. Each of the parties shall bear their own costs and expenses, other than those specifically enumerated for herein.

FORUM FEES

Pursuant to §43(c) of the N.A.S.D. Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("N.A.S.D.") shall retain the non-refundable filing fee in the amount of $500.00 and shall retain as forum fees the hearing session deposit in the amount of $750.00 previously deposited with the N.A.S.D. by the Claimant.

EXHIBIT B

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Plaintiff, ORDER AND MEMORANDUM
File No. CT 94-15904

v.

R.J. Steichen and Company
and John E. Feltl,

Defendants.

The above-entitled matter came on for hearing before the Honorable Delila F. Pierce, one of the judges of the above-named court, on the 15th of December, 1994, on Plaintiff's motion to vacate arbitrators, award and Defendants' motion to confirm arbitration award at the Hennepin County Government Center, Minneapolis, Minnesota.

Rebecca E. Bender, Esq. appeared for and on behalf of Plaintiff; Steven E. Rau, Esq. appeared for and on behalf of Defendants.

Now, therefore, based on the files, records and proceedings and the arguments of counsel:

MEMORANDUM

Facts

This matter comes before the Court on Plaintiff's motion to vacate the arbitrators' decision in the National Association of Securities Dealers, Inc. (NASD) arbitration captioned Brian L. Honn v. R.J. Steichen and company and John E. Feltl, NASD Case No. 9302443, and on Defendants' motion to confirm same.

Plaintiff, a securities broker, brought an action against his former employer, R.J. Steichen and Company (R.J. Steichen), a brokerage firm, and its president/owner John E. Feltl, for defamation, breach of contract and misrepresentation, after Plaintiff had voluntarily left the employment of R.J. Steichen.

Brokers are required, under the Rules of the NASD, to have their claims decided by an NASD arbitration panel. Therefore, the case was heard by a panel of arbitrators appointed by the NASD. The NASD panel awarded Plaintiff $7312.50 together with pre-judgment interest against Defendants.

Defendants allege that Plaintiff's discontent with the award is the underlying reason for his motion to vacate the decision and re-litigate his claims. Defendants contend that Plaintiff availed himself of all of the advantages of arbitration until Plaintiff received an award with which he was dissatisfied. Defendants also claim that at the end of the arbitration, all parties agreed that they had received a fair and impartial hearing on the issues. Defendants contend that because Plaintiff has received a fair hearing, this Court should confirm the NASD arbitrators' award.

Plaintiff, however, argues that the arbitration proceeding was unfair. Plaintiff contends that the arbitrators' award was procured by corruption, fraud or other undue means. In addition, Plaintiff claims that there was evident partiality and

Minn. Stat. §572.19.

The Minnesota statutory section is modeled after 9 U.S.C. §10 of the Federal Arbitration Act. 9 U.S.C. §10 provides in relevant part:

> In any of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:
>
> 1. Where the award was procured by corruption, fraud or undue means;
>
> 2. Where there was evident partiality or corruption in the arbitrators, or either of them;
>
> 3. Where the arbitrators were guilty of misconduct... in any misbehavior by which the rights of any party have been prejudiced; or
>
> 4. Where the arbitrators exceeded their powers.

9 U.S.C. §10. Any one of these individual findings is sufficient, in and of itself, to vacate the arbitrators' award.

The standard of judicial review of arbitration procedures is whether a party to an arbitration has been denied a fundamentally fair hearing. See Baar v. Tigerman, 140 Cal. App. 3rd 979 (Cal. 1983).

The test to be applied is that of a reasonable person. More specifically, an arbitration award must be vacated upon a finding of "evident partiality," which exists "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." Local 814 Internat'l Bd. of Teamsters v. J & B Installer & Moving, Inc.,

received an official response regarding the validity of this testimony from Schief. In that letter, Schief stated that "[t]he NASD has a long-standing policy not to provide staff persons as so-called expert or technical witnesses in private litigation or in arbitration proceedings."

This letter makes clear that the NASD does not approve of its employees testifying in arbitration matters. In this case, the NASD overstepped their own policies and rules. The court therefore finds that allowing an NASD official to testify in the arbitration proceeding was unfair and therefore prejudiced the Plaintiff.

Plaintiff's also contend that the proceeding was corrupted by the NASD coordinator requesting a job from the securities industry panelist, James Kaiser, a former Paine-Webber manager.

The arbitration proceeding at issue concerned misrepresentation, defamation and breach of contract and thus in accordance with the NASD Rules, two persons not affiliated with the securities industry and one person designated as an affiliate of the securities industry, were chosen to decide the dispute between the parties.

Apparently, during a break in the arbitration hearing, Sharon Kranz, the Chicago NASD Case Administrator was talking to James Kaiser, the securities industry arbitrator on the panel. Kranz, a representative of the impartial sponsoring entity, was discussing with Kaiser whether Kaiser knew of any jobs for her in the securities industry.

It is the duty of the NASD Case Administrator (Kranz) to see that the hearings are conducted in an impartial manner. It therefore follows that she must be an impartial source of information owing nothing to the industry. Clearly, there is too close of a professional connection between the NASD Case Administrator and the arbitration panel deciding a dispute for favors to be requested of a panel member.

EXHIBIT C

STATE OF MINNESOTA

IN COURT OF APPEALS

Brian L. Honn,

Respondent,

ORDER

vs.

#C5 95-256

R.J. Steichen and Company,

Appellant.

BASED UPON THE FILE, RECORD AND PROCEEDINGS, AND BECAUSE THERE IS A QUESTION WHETHER THIS COURT HAS JURISDICTION:

1. This appeal was filed February 2, 1995.

2. Appellant seeks review of a January 20, 1995 order granting respondent's motion to vacate the arbitrator's award and remanding the matter for rehearing by new arbitrators.

3. Appealable orders in arbitration proceedings are listed in Minn. Stat. § 572. Mivoi v. Gold Bond Stamp Co. Employees Retirement Trust, 293 Minn. 376, 378, 196 N.W.2d 309, 310 (1972). The statute provides that an appeal may be taken from an order "vacating an award without directing a rehearing." Minn. Stat. § 572.26, subd. 1(5)

jurisdictional issue raised, the failure to dismiss the appeal may result in the imposition of sanctions against counsel. See Radloff v. First Am. Nat'l Bank of St. Cloud, 470 N.W.2d 154 (Minn. App. 1991); Swenson v. City of Fifty Lakes, 439 N.W.2d 758 (Minn. App. 1989); Lund v. Corporate Air, Inc., 438 N.W.2d 458 (Minn. App. 1989), rev'd in part (Minn. June 21, 1989).

5. This order does not stay or extend briefing deadlines or other procedural requirements under the rules.

Dated: February 8, 1995

BY THE COURT

s/Anne V. Simonett
Chief Judge

AW/blm

(1994); Metropolitan Airports Comm'n v. Metropolitan Airports Police Federation, 443 N.W.2d 519, 523 (Minn. 1989). We decline to construe Minn. Stat. § 572.26, subd. 1(3) as allowing an appeal from any order denying confirmation of an award because it appears the legislature intended to limit appeals from orders vacating awards to situations where no rehearing is directed. See Minn. Stat. § 645.17(2) (1994) (presumption that the legislature intends the entire statute to be effective and certain).

Appellants argue that Minn. Stat. § 572.26, subd. 1(5) is preempted by the Federal Arbitration Act (FAA) because the FAA allows an appeal from an order vacating an award, regardless of whether a rehearing is directed. See 9 U.S.C.A. § 16(a)(1)(E) (West Supp. 1994). We hold that the FAA does not control the process by which substantive rights pertaining to arbitration are reviewed in state court. See Xaphes v. Mowry, 478 A.2d 299, 301 (Me. 1984); Batton v. Green, 801 S.W.2d. 923, 930 (Tex. App. 1990).

Appellants have not established a compelling reason for review of the January 20 order. See Mivoi v. Gold Bond Stamp Co. Employees Retirement Trust, 293 Minn. 376, 378, 196 N.W.2d 309, 310 (1972) (declining to grant discretionary review where nonappealable arbitration order did not expose the aggrieved party to irreparable damage).

IT IS HEREBY ORDERED:

1. The direct appeal (C5-95-256) is dismissed.

2. The petition for discretionary review (C2-95-392) is denied.

3. The Clerk of the Appellate Courts shall provide copies of this order to the Honorable Delila F. Pierce, counsel of record, and the court administrator.

EXHIBIT E

STATE OF MINNESOTA

IN SUPREME COURT

C5-95-256

Brian L. Honn,

Respondent,

vs.

R.J. Steichen & Company, et al.,

Appellants.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of R.J. Steichen & Company, et al. for further review be, and the same is, denied.

Dated: April 27, 1995

BY THE COURT:
s/ A.M. Keith

Chief Justice

ANDERSON, J. took no part in the consideration or decision of this case.

(2)

Supreme Court, U.S.
FILED
JUL 15 1995
CLERK

No. 95-144

In the

Supreme Court of the United States

October Term, 1995

R.J. Steichen & Company and John E. Feltl,

Petitioners,

vs.

Brian L. Honn,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether there is a federal policy favoring arbitration under a certain set of procedural rules, aside from the federal policy of ensuring the enforceability of private agreements to arbitrate according to their terms pursuant to Sections 1 and 2 of the Federal Arbitration Act. (FAA) 9 U.S.C. § 16(a).

Whether the FAA's procedural provisions, found under Sections 3 and 4 of the Act are now applicable in all state courts, despite the fact that state procedural post-arbitration statutes are not anti-arbitration statutes.

Whether a party's inconvenience in submitting to arbitration again after the initial process is found by a district court to be flawed pursuant to the Minnesota Arbitration Act, Minn. Stat. § 572.19, constitutes a compelling reason for appellate court review as a matter of right of the district court's order to vacate and remand to arbitration.

Whether an important question of federal law pursuant to Rule 10 of the Supreme Court Rules and 28 U.S.C. § 1257 exists with respect to state procedural post-arbitration statutes which do not allow an appeal as a matter of right from a district court's vacatur and remand to arbitration, when such statutes are not repugnant to federal law.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

R.J.Steichen & Company and John E. Feltl,

Petitioners,

v.

Brian L. Honn,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

INTRODUCTION

Respondent, Brian L. Honn (hereinafter referred to as "Honn)" prays that this Court deny the Petition for Writ of Certiorari to the Minnesota Supreme Court, which is merely another in a long line of attempts by Petitioners to delay the non-prejudiced rehearing of this matter before the National Association of Securities Dealers, Inc. (hereinafter referred to as "NASD").

STATEMENT OF JURISDICTION

Respondent Honn disagrees with Petitioners' Statement of Jurisdiction, as neither the validity of the Federal Arbitration Act is drawn into question with Minn. Stat. § 572.26, subd. 1(5), nor is the validity of Minn. Stat. § 572.26 repugnant to the Constitution or laws of the United States.

The Steichen Petitioners have also not presented a final order to this Court for review. In Metropolitan Airports Commission v. Metropolitan Airports Police Federation, 443 N.W.2d 519 (Minn. 1989), the Court stated that an order vacating an arbitration award and ordering rehearing on the underlying arbitration claim was not appealable pursuant to Minn. Stat. § 572.26, subd 1(5). The Minnesota Supreme Court in Metropolitan Airports Commission, id., also stated that the only judgments which are appealable under Minn. R. Civ. App. P. 103.03(a) or Chapter 572 in this context are those confirming, modifying or correcting an award.

There is no procedural history in the case of Honn v. Steichen in which the award was confirmed, modified or corrected. Where the rights and liabilities of parties were not finally determined by the District Court, when the District Court made no final decision concerning the claims and defenses raised, and when the District Court ordered a rehearing of this arbitration matter, the District Court Order is not a final order. See AFSCME Council 14 v. St. Paul Ramsey Hospital, 425 N.W.2d 318 (Minn. App. 1988). The Minnesota Supreme Court's refusal to grant a petition for discretionary review does not transform the District Court's Order into a final order.

STATUTES INVOLVED

Petitioners have failed to cite to the only statute which formed the basis for Honn's Motion to Vacate the arbitration

award and the Steichen Petitioners' Motion to Confirm, namely Minn. Stat. § 572.19. Minn. Stat. § 572.19 provides, in relevant part:

> Upon application of a party a court shall vacate an award where:
>
> (1) The award was procured by corruption, fraud or other undue means;
>
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> (3) The arbitrators exceeded their powers; or
>
> (4) The arbitrators so conducted the hearing, contrary to the provisions of Section 572.12, as to prejudice substantially the rights of a party.

STATEMENT OF CASE

On October 25, 1994, Respondent Brian L. Honn brought a Motion to Vacate an NASD Arbitrators' Award in District Court for the State of Minnesota due to the fact that:

(1) the award was procured by corruption or other undue means (Minn. Stat. § 572.19(1));
(2) there was partiality by the National Association of Securities Dealers, Inc. ("NASD") and by the NASD Arbitrators and/or misconduct prejudicing the rights of Mr. Honn (Minn. Stat. § 572.19(2));
(3) the NASD Arbitrators exceeded their powers (Minn. Stat. § 572.19(3)); and

(4) the NASD Arbitrators and the NASD conducted the hearing in a manner which substantially prejudiced the rights of Claimant Brian Honn (Minn. Stat. § 572.19(4)).

Mr. Honn, a securities broker, brought an action against R.J. Steichen & Company, a brokerage firm and its president/owner John E. Feltl for defamation, breach of contract, promissory estoppel, civil conversion/violation of NASD Rules of Fair Practice, violation of Minn. Stat. § 181.145 and misrepresentation, after Mr. Honn had voluntarily left the employment of R.J. Steichen. Brokers are required under the NASD Rules to have their claims decided by an NASD arbitration panel. However, this agreement to arbitrate before the NASD does not limit the reach of Minn. Stat. § 572.19, which states that a court "shall vacate an award" where any of the above-referenced problems or other designated problems exist in the arbitration.

The clear prejudice which the District Court saw in this matter resulted from an NASD attorney testifying on behalf of the Steichen Petitioners, without a valid subpoena, as an expert witness in an NASD arbitration before arbitrators appointed by the NASD, as well as due to an NASD staff attorney requesting employment from the securities industry member of the NASD appointed panel.

Petitioners' Statement of the Case is inaccurate in several material respects. In addition to misstating some material facts, Petitioners' Petition is potentially misleading due to what are known by securities litigation practitioners as material omissions.

First, the only legal issues which Petitioners R.J. Steichen & Company and John E. Feltl (hereinafter "Steichen Petitioners") sought to be reviewed at the Court of Appeals level on direct appeal and pursuant to a Petition for Discretionary Review were: (1) whether the judicial standard

of review of arbitration procedures contemplates a determination of whether a party has been denied a fundamentally fair hearing; (2) whether unsubstantiated and speculative assertions contained within affidavits that an arbitration was unfair provide the appropriate evidentiary grounds for vacation of an arbitration award; and (3) whether Honn satisfied his burden of proof under Minn. Stat. § 572.19 to show evident partiality in the case.

As this Court is aware, the Minnesota Court of Appeals declined to review the direct appeal (C5-95-256) as a matter of right. The Minnesota Court of Appeals also denied the Petitioners' Petition for Discretionary Review on the above-mentioned grounds. (C2-95-392). The Minnesota Supreme Court was first faced with similar issues to those presented here in the Petition for Discretionary Review filed by the Steichen Petitioners.

Just as none of the criteria in Minn. R. Civ. App. 117 supported the Minnesota Supreme Court's review of the discretionary petition which the Minnesota Court of Appeals had already refused to review, so does this petition fail to raise any issues pursuant to Rule 10 of the Supreme Court Rules which would justify this Court's review. (See Reasons for Not Granting Petition, infra.) The Steichen Petitioners merely disagreed with the factual findings of the District Court. The Court of Appeals found that this was not a sufficient basis for discretionary review of this record.

Second, contrary to Petitioners' assertions, Judge Delila F. Pierce, in granting Mr. Honn's Motion to Vacate, did not solely grant the motion on the issue of evident partiality or create a new standard for judicial review of arbitration awards. A review of the record in Judge Pierce's decision shows otherwise.

On Page 2 of the Judge's Memorandum, the Court cites to the four relevant portions of Minn. Stat. § 572.19. Though the Steichen Petitioners would prefer that this Court solely

found that there was "evident partiality," to thereby limit the Judge's Opinion, the Opinion itself is speaking more loudly than any mischaracterization of that Opinion is able to do.

Clearly, when the Court held that allowing an NASD employee to testify as an expert on behalf of a party in an NASD proceeding "presents at the very least, bias and prejudice," the Court is referring to the language in Minn. Stat. §§ 572.19(2) and (4). In addition, when the Court holds that admitting such testimony "raises questions both as to the fairness of the proceeding and whether or not the NASD arbitrators may have had a difficult time disagreeing with an NASD employee," the Court is referring to Minn. Stat. §§ 572.19(1), (2) and (4).

Finally, when the Court states that Mr. Honn was denied a fundamentally fair proceeding, what better way to characterize Minn. Stat. § 572.19(4), which refers to conduct "prejudicing substantially the rights of a party" or Minn. Stat. § 572.19(2) last phrase, which refers to "misconduct prejudicing the right of any party."

In the Discussion section of Judge Pierce's Memorandum, which proceeds from pages four through six of that Memorandum, the Court, inter alia, finds that: (1) Craig Landauer (who was called to testify by the Steichen Petitioners) was an expert witness; (2) allowing an NASD employee such as Landauer as an expert on behalf of one of the parties in an NASD proceeding where the NASD selects the arbitrators to hear a particular dispute presents at the very least bias and prejudice; (3) allowing an NASD official to testify on behalf of one party placed the other party at an extreme disadvantage before the panel; (4) the NASD overstepped its own policies and rules which do not allow its employees to testify as experts in arbitration matters; (5) allowing an NASD official to testify in the arbitration proceeding was unfair and prejudicial to Honn; and (6) an NASD Case Administrator requesting a job from the securities

industry arbitrator on the panel undermined the necessary impartiality required in arbitration proceedings. All of these findings support the District Court Judge's decision to vacate pursuant to Minn. Stat. § 572.19; not pursuant to any new standard, and not solely due to a finding of "evident partiality." The District Court's Order makes specific reference to the strong policy in Minnesota favoring arbitration. However, in this case, the District Court properly found that under Minn. Stat. § 572.19, the Court was required to vacate the arbitration award, as several of the individual findings in Minn. Stat. § 572.19 were made.

Third, contrary to Petitioners' assertions, Mr. Honn's actual Motion to Vacate at the District Court level was brought solely pursuant to Minn. Stat. § 572.19. The Steichen Petitioners' Motion to Confirm the Arbitration Award was also brought solely pursuant to Minnesota Statutes. The Federal Arbitration Act was utilized by the parties and the court solely for illustrative purposes. When the Steichen Petitioners state that "Honn also argued that nearly every other statutory basis contained in the MAA and FAA supported vacatur," they are misstating the bases contained within Mr. Honn's District Court motion papers. When Petitioners state that "Honn and Steichen both relied upon the FAA . . .," they are attempting to change history and the contents of their own motion papers.

Fourth, Petitioners mischaracterize the evidence offered at the District Court level in their Statement of Case. As part of this brief, Respondent has attached copies of the same documents which were offered to the District Court in support of Mr. Honn's Motion to Vacate. Mr. Honn offered 15 exhibits (Exhibits A through O). In addition to the 15 exhibits, there were two affidavits offered. Briefly, Mr. Honn's affidavit was not hearsay, as has been continually claimed by the Petitioners, as under Rule 801 of the Rules of Evidence, hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing offered in

evidence to prove the truth of the matter asserted." Mr. Honn was testifying solely regarding a conversation between the securities industry arbitrator on the panel and the NASD Case Administrator (Kranz). This conversation was not offered to prove the truth of the matter asserted, namely that the NASD officer Kranz was, in fact, looking for a job outside of the NASD. Therefore, it is not hearsay.[1]

In addition, the Bender Affidavit, like the Honn Affidavit, was made on personal knowledge and is supported by an independent source, NASD official William Schief, at Exhibit L (and the other attachments to the Affidavit). Mr. Schief, on behalf of the NASD, stated the NASD policy to not allow its employees to testify as experts in civil matters, making it clear that for the NASD's Landauer to testify at a private NASD arbitration hearing on behalf of an NASD member (Steichen), when the NASD did not allow other litigants to have this advantage created, at a minimum, an atmosphere of bias and prejudice.[2]

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[1] It is ludicrous for the Steichen Petitioners to apparently continue to recommend that Mr. Honn should have contacted the NASD Administrator Kranz to ask her to submit an affidavit concerning her wrongdoing or to suggest that Mr. Honn should have contacted the arbitrator involved to draft an affidavit (which would have been in violation of the NASD Code of Arbitration Procedure which prohibits contact with arbitrators while a matter is pending). If the Steichen Respondents are truly in favor of forwarding the goals of arbitration, one of those goals surely must be to allow probative evidence of wrongdoing in an arbitration to be reviewed by a court hearing a motion to vacate.

[2] There are numerous other misstatements of fact which do not impact directly on this petition. However, in order to make certain to comply with Rule 15 of the Supreme Court Rules, Respondent Honn believes it important to advise the Court that the NASD Panel's award did not solely award Honn monies for unpaid commissions and deny all of Honn's other claims, as stated by the Petitioners. Two Thousand four hundred thirty-seven dollars and 50/100 ($2437.50) were awarded by the arbitrators as "compensatory damages." The arbitrators did not indicate their basis for awarding this

It should also be noted that under these circumstances, there is no requirement that an entire transcript be provided to a reviewing court. In Petitioners' Memorandum in Opposition to Honn's Motion to Vacate, Steichen's counsel cites to Pyle v. Securities U.S.A., Inc., 758 F. Supp. 638 (D. Colo. 1991), allegedly for the proposition that courts are allowed to refuse to vacate an NASD award where a broker "did not provide the full transcript of the proceeding." The Pyle case stands for no such broad principle. Rather, in that case, the court held on a very limited issue, namely that when a motion to vacate was based upon the arbitrators acting in manifest disregard of the law (which was never a basis for Mr. Honn's Motion to Vacate in this matter), the court would have needed to examine the record of the arbitration proceeding.

In Pyle, contrary to Steichen's representations in the District Court proceeding, no portion of the transcript was provided to the court to decide whether there had been manifest disregard of the law. In the Honn submissions to the District Court, the portions of the transcript which dealt with

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amount. The arbitrators also awarded 6% interest on the $2437.50, once again not indicating the basis for their compensatory damage figure. On top of this, the arbitrators awarded penalties and attorneys' fees (not commissions), pursuant to Minn. Stat. § 181.145 in the amount of $4875.00. The arbitrators also ordered the Petitioner R.J. Steichen to "promptly cause to be prepared and filed with the NASD, CRD [Central Registration Depository] amendments to Claimant's [Honn's] form U-5 in accordance with the Rules of Fair Practice and consistent with factual information known by Respondent R.J. Steichen." Finally, the Arbitrators also ordered R.J. Steichen to pay additional forum fees and to reimburse Mr. Honn for his hearing session deposit.

Another correction to Petitioners' Statement of Case is that at the time of the arbitration hearing in this matter, Mr. Honn was seeking approximately $600,000.00, as the present value of damage to him due to Steichen and its president Feltl filing a false form U-5 when Mr. Honn voluntarily left the Steichen firm.

the issues forming the bases for Mr. Honn's Motion to Vacate were provided to the Court. Even the Steichen Petitioners could not refute that fact.

REASONS FOR NOT GRANTING THE WRIT

The Steichen Petitioners are not, as they claim, seeking to present an important issue to this Court. Rather, they are seeking to delay the proper rehearing of an arbitration that they caused to be tainted by prejudice and bias. The "post-arbitral conundrum" which the Steichen Petitioners refer to, is nothing more than posturing at the expense of a speedy end to this dispute.

This is not a situation as set forth under Rule 10 of the Supreme Court Rules. The Minnesota Supreme Court's denial of Steichen's Petition for Discretionary Review does not result in a federal question being decided in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals. In addition, the Minnesota Supreme Court's refusal to grant Steichen's petition does not amount to a state court deciding an important question of federal law which should be settled by this Court or which conflicts with an applicable decision of this Court.

The key cases which resulted in the Minnesota Court of Appeals not allowing this matter to be appealed as a matter of right are Xaphes v. Mowry, 478 A.2d 299, 301 (Me. 1984), Batton v. Green, 801 S.W.2d 923, 930 (Tex. App. 1990) and the consistent United States Supreme Court decisions cited therein. In Batton, supra, the Court held that substantive rights bestowed upon litigants by the Federal Arbitration Act do not control the procedure by which those substantive rights are adjudicated in state court.

In Batton, the court interpreted the Supreme Court's decision in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983). In Cone, id., the

Court held that Section 2 of the Federal Arbitration Act is a congressional declaration of a liberal federal policy favoring arbitration agreements "notwithstanding any state substantive or procedural policies to the contrary." The Court in Batton explained that this phrase refers to state policies perceived as anti-arbitration. The Batton Court found that Texas law which did not allow appeals from interlocutory orders was not "anti-arbitration."

> . . . there is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability according to their terms of private agreements to arbitrate. Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989). Although the Act's substantive provisions (Sections 1 and 2) are applicable in state as well as federal court, the United States Supreme Court has never held that Sections 3 and 4 of the Act, which by their terms appear to apply only to proceedings in federal court are nonetheless applicable in state court.

In the case at bar, the fact that Minnesota Appellate Courts do not allow district court orders which vacate an arbitration award and order rehearing in arbitration to be appealed as a matter of right, cannot be seen as fostering an anti-arbitration policy. Rather, it is a way in which a dispute will be resolved more quickly in arbitration, instead of having the parties waste time and money in the appellate courts of a state.

It is also important to correct the misinterpretation of case law within the Petition filed with this Court. For example, unlike in the Supreme Court cases cited by the Steichen Petitioners, i.e., Allied-Bruce Terminix Co., Inc. v. Dobson, 115 S. Ct. 834 (1995) and Southland v. Keating 465 U.S. 1

(1984), the Minnesota Supreme Court was not and this Court is not dealing with specifically "anti-arbitration laws." The Minnesota Arbitration Act does not evidence any judicial hostility to arbitration agreements as in those cases.

It is also crucial to point out that Forsythe International SA v. Gibbs Oil Company, 915 F.2d 1017 (5th Cir. 1990), though cited by the Steichen Petitioners in support of their petition, is inapplicable to the instant case. The Steichen Petitioners fail to mention to this Court that in the Forsythe decision there was no question of contrary state law on procedural issues such as the right to a direct appeal in the instant action.

The Steichen Petitioners also place great emphasis on the case of Atlantic Aviation, Inc. v. EBM Group, Inc., 11 F.3d 1276 (5th Cir. 1994), without focusing this Court's attention on the fact that Atlantic involved a motion to modify an arbitration award, which was never the case in the Honn v. Steichen arbitration.

As in Xaphes v. Mowry, supra, the only "damage" which will be suffered by the Steichen Petitioners in denying them an appeal as a matter of right is that they will be "inconvenienced by the necessity of submitting to arbitration." See Mivoi v. Gold Bond Stamp Company Employees Retirement Trust, 196 N.W.2d 309, 310 (Minn.1972). This, combined with the lack of any true conflict between the courts, does not constitute a compelling reason for review of the District Court's Order to vacate and remand to arbitration.

CONCLUSION

There is no confusion among securities arbitration practitioners with respect to whether a state's post-arbitration procedural statutes which do not foster an anti-arbitration policy, such as laws which do not allow appeals from

interlocutory orders, are controlling. There is also no such confusion among the state and federal courts of this land.

The Steichen Petitioners in this matter seek to manufacture a conflict where none exists. Under the facts of this case and the consistent law of this Court, Respondent Honn respectfully requests that this Court deny the Petition for Discretionary Review and allow him his long-delayed impartial, non-prejudiced hearing.

Dated: August 15, 1995

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ATTORNEYS FOR RESPONDENT
BRIAN L. HONN

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CASE TYPE: MISREPRESENTATION/
DEFAMATION/CONTRACT

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Court File No. CT94-015904

Claimant/Plaintiff,

v.

R.J. Steichen and Company and John E. Feltl,

Respondents/Defendants.

AMENDED NOTICE OF MOTION AND MOTION TO VACATE ARBITRATORS' AWARD

On December 15, 1994 at 9:00 a.m., before Hennepin County Judge Delila Pierce, Claimant/Plaintiff Brian L. Honn will bring a motion to vacate the Award of the NASD Arbitrators in Case No. 93-02443, at the Hennepin County Government Center in Minneapolis, Minnesota.

MOTION

The bases for this motion include the fact that the award was procured by corruption or other undue means (Minn. Stat. § 572.19(1)); as there was partiality by the National Association of Securities Dealers, Inc. and by the NASD arbitrators and/or misconduct prejudicing the rights of Mr. Honn (Minn. Stat. § 572.19(2)); as the NASD arbitrators

exceeded their powers (Minn. Stat. § 572.19(3)); and as the NASD arbitrators and the NASD conducted the hearing in a manner which substantially prejudiced the rights of Claimant Brian Honn (Minn. Stat. 572.19(4)).

Dated: October 25, 1994

s/s

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ATTORNEYS FOR PLAINTIFF
BRIAN LARON HONN

STATE OF MINNESOTA

CASE TYPE: ARBITRATION
DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn, Claimant/Plaintiff, v. R.J. Steichen and Company and John E. Feltl, Respondents/Defendants.	**NOTICE OF MOTION AND MOTION TO CONFIRM ARBITRATORS' AWARD**

PLEASE TAKE NOTICE that on December 15, 1994 at 9:00 a.m. before Judge Delila F. Pierce, Respondents/Defendants R.J. Steichen and Company and John E. Feltl will bring a motion to confirm the award of the N.A.S.D. Arbitrators in Case No. 93-02443 at the Hennepin County Government Center in Minneapolis, Minnesota.

MOTION

This basis of this motion is Minn. Stat. §572. The law in the course of the State of Minnesota presume arbitration awards to be correct and claimant/plaintiff cannot satisfy any of his burdens of proof outlined in Minn. Stat. §572.19. In addition, prior to the arbitration claimant/plaintiff signed a Uniform Submission Agreement in which he agreed to abide by the award provided in N.A.S.D. Case No. 93-02443.

Respectfully submitted,

Dated: October 28, 1994

s/s

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CASE TYPE: MISREPRESENTATION/
DEFAMATION/CONTRACT

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Court File No. CT94-015904

Claimant/Plaintiff,

v.

MEMORANDUM IN SUPPORT OF MOTION TO VACATE

R.J. Steichen and Company
and John E. Feltl,

Respondents/Defendants.

I. INTRODUCTION

This Memorandum is filed in support of Plaintiff Brian Honn's Motion to Vacate the Arbitrators' decision in the National Association of Securities Dealers, Inc. ("NASD") arbitration captioned Brian L. Honn v. R.J. Steichen and Company and John E. Feltl, NASD Case No. 93-02443. Plaintiff Brian Honn, a securities broker, brought an action against his former employer, R.J. Steichen, a brokerage firm and its president/owner John E. Feltl for, inter alia, defamation, breach of contract and misrepresentation, after Mr. Honn voluntarily left R.J. Steichen.

The case was heard by a panel of arbitrators appointed by the National Association of Securities Dealers, Inc. When

brokers have disputes with their former employers, they are required under the Rules of the NASD to have their claims decided by an NASD arbitration panel. Plaintiffs like Brian Honn may not proceed through the court system or through any non-NASD arbitration forum.

Though it is admittedly rare for an arbitration decision to be vacated by the court, the legislature enacted Minnesota Statute 572.19 for a reason. Minn. Stat. § 572.19 provides, in relevant part:

> Upon application of a party a court shall vacate an award where:
>
> 1. The award was procured by corruption, fraud or other undue means;
>
> 2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> 3. The arbitrators exceeded their powers; or
>
> 4. The arbitrators so conducted the hearing, contrary to the provisions of Section 572.12, as to prejudice substantially the rights of a party.

If the legislature had intended that arbitration decisions handed down in prejudiced, bias and/or corrupt proceedings be allowed to stand, this statute would not have been enacted, nor would the mandatory language of "the court shall vacate" have been used. Similarly, if the Minnesota legislature had intended to exclude biased or prejudicial NASD proceedings from the scope of this statute, it surely would have noted this exception.

Counsel to Plaintiff Honn has been practicing almost exclusively in the area of securities litigation and arbitration for twelve years and over the last one and one-half years has represented parties in 17 separate NASD securities arbitrations. (See Affidavit of Rebecca E. Bender.) Though counsel to Plaintiff believes in the fairness of the NASD arbitration forum generally, in the Honn v. Steichen case, the proceeding was simply not fair. Mr. Honn is entitled to a fair, unbiased forum. He was not provided such a forum. The arbitrators' decision must therefore be vacated.

In this case, as will be shown in this Memorandum, the award was procured by corruption, fraud or other undue means, there was evident partiality and misconduct prejudicing the rights of Mr. Honn, the arbitrators exceeded their powers, and the arbitrators conducted the hearing in a manner so as to prejudice the rights of Mr. Honn.

If there ever were a case which entitled a party to have the arbitrators' decision vacated and a new arbitration ordered, this is the one.

II. THE LAW

Minn. Stat. § 572.19, referenced in the Introduction to this Memorandum, provides that a court is required to vacate an award under certain circumstances. This Minnesota statutory section is modeled after 9 U.S.C. § 10 of the Federal Arbitration Act. 9 U.S.C. § 10 provides in relevant part:

> In any of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -
>
> 1. Where the award was procured by corruption, fraud or undue means;

2. Where there was evident partiality or corruption in the arbitrators, or either of them;

3. Where the arbitrators were guilty of misconduct . . . in any misbehavior by which the rights of any party have been prejudice; or

4. Where the arbitrators exceeded their powers.

As there are obviously more courts which have interpreted 9 U.S.C. § 10 throughout the country, than there are Minnesota Courts which have interpreted Minn. Stat. § 572.19, it is helpful to look to these other jurisdictions for guidance in interpreting Minnesota's statute regarding vacating of an arbitrators' decision.

For example, in Local Union 42 v. Absolute Environmental Services, 814 F. Supp. 392 (D. Del. 1993), the court, in the context of a labor dispute, stated:

> . . . a district court's review of an arbitration award is not merely a perfunctory exercise which always results in the affirmation of the arbitration award below.

Similarly, in Konkar Maritime Enterprises v. Compagnie Belge d'Affretement, 668 F. Supp. 268 (S.D.N.Y. 1987), the court held:

> Where a party to an arbitration does not receive a full and fair hearing on the merits, a district court will not hesitate to vacate the award. See, e.g., Teamsters Chauffeurs, etc. v. E.D. Clapp Corp., 551 F. Supp. 570, 578 (N.D.N.Y. 1982), aff'd 742 F.2d 1441 (2d Cir. 1983); Amalgamated Cotton Garment & Allied

Industries Fund v. JBC Company, 608 F. Supp. 158, 164-65 (W.D. Pa. 1984); Seldner Corp. v. W.R. Grace & Co., 22 F. Supp. 388, 39-93 (D. Md. 1938)

. . . .

It is important to point out that any one of these four bases for a motion to vacate, in and of itself, may support this court's vacating of the arbitrators' decision. Namely, should this Court conclude that the award was procured by corruption, fraud or other undue means, that there was evident partiality, that there was misconduct prejudicing the rights of a party, or that the arbitrators exceeded their powers, any one of these individual findings is sufficient to vacate the arbitrators' award.

The test to be applied by this Court is a simple "reasonable person" test. For example, an arbitration award must be vacated upon a finding of "evident partiality," which exists "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." Local 814 International Bhd. of Teamsters v. J & B Installers and Moving, Inc., 878 F.2d 38, 40 (2d Cir. 1989), quoting Morelite construction Corp. v. New York City District Court Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984).

> Proof of actual bias or 'outright chicanery' is often impossible to obtain, and thus is not required to show evident partiality; instead, courts should consider the totality of the circumstances in deciding the existing of evident partiality. Commonwealth Coatings Corp. v. Continental Casualty Company, 393 U.S. 145, 150-51 (1968); Morelite, supra at 84; Sun Refining & Marketing Company v. Statheros Shipping Corp., 761 F. Supp. 293, 298 (S.D.N.Y.), aff'd 948 F.2d 1277 (2d Cir. 1991) . . .

U.S. v. International Broth. of Teamsters, 814 F. Supp. 1165 (S.D.N.Y. 1993).

In Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994), the Ninth Circuit Court further explained the meaning of "evident partiality" under 9 U.S.C. § 10. There, the court held that a "reasonable impression of partiality" is sufficient and that the finding of evident partiality of just one arbitrator warrants the vacatur of the arbitration award.

As will be clear to this Court after reading the Argument portion of this Memorandum which follows, there was evident partiality not solely with one of the arbitrators, but also with the sponsoring forum, namely the National Association of Securities Dealers, Inc.

The National Association of Securities Dealers, Inc. not only served as the sponsoring entity for the arbitration, it also, contrary to NASD policy, provided one of its own representatives to testify voluntarily as a witness for its member firm, R.J. Steichen, in the Honn v. Steichen arbitration. This situation provides an even more egregious case of prejudice and bias than if just one arbitrator were biased. The Ninth Circuit in the Schmitz case, id., held:

> A finding of evident partiality in one arbitrator generally requires vacatur of the arbitration award. As stated in Wheeler v. St. Joseph Hospital, 63 Cal. App. 3rd 345 (1976):
>
> 'The arbitrators are not isolated from each other; they hear and decide the case as a panel after joint discussion, debate and deliberation. Each panel member has an opportunity to persuade the others.' . . . Thus, notwithstanding that a majority of an arbitration panel is required to enter any arbitration award, when one arbitrator is evidently partial, the panel's award must generally be suspect. This

conclusion holds particularly when the other panel members vote with the evidently partial arbitrator, as will be the case in most awards that are later challenged.

As one reads through Plaintiff's Memorandum in Support of Motion to Vacate, the question that comes to mind with respect to an NASD representative testifying in an NASD civil arbitration proceeding is obvious: "Why did the NASD make an exception and allow a staff person to testify contrary to its policies, in the Honn v. Steichen case?" The answer is actually quite simple.

NASD brokerage firms such as R.J. Steichen are members of the National Association of Securities Dealers, Inc. When brokerage firms cease to operate as ongoing entities, the NASD ceases to receive member fees from the brokerage firms. It is in the NASD's interest and in the interest of persons employed by the NASD, that brokerage firms continue to be successful and prosper.

The claims which Plaintiff Brian Honn was bringing against R.J. Steichen were primarily claims for defamation. These claims were based upon inaccurate information contained on a Form U-5 submitted by R.J. Steichen to the NASD when a broker leaves a firm, whether voluntarily, as in Mr. Honn's case, or when a broker is terminated for cause. It is commonly known among attorneys who practice in the securities litigation and arbitration area that there have not been many cases dealing with a broker's claims for defamatory statements made on his Form U-5 by his former employer, following his leaving a brokerage firm. However, several high profile cases, including a case against Dean Witter Reynolds (see Exhibit O to Bender Affidavit), have shown that awards against brokerage firms for defamatory language on a Form U-5 can be extremely costly to brokerage firms. In the Wall Street Journal article, an award of $1.5 million was made to a

former employee of Dean Witter who sued his firm for defamation.

So in answer to the question of what caused the NASD arbitration forum and the NASD arbitrators to allow an NASD representative to testify on behalf of a brokerage firm in this action, the answer is this: the NASD left its usual impartial role and took on the role of advocate for the brokerage industry, at the strong request of one of the its broker members, R.J. Steichen. This change of hats by the NASD was done solely to protect the industry from future large defamation arbitration awards.

The failure by the NASD and the arbitrators to disclose this advocacy situation and these "dealings that might create an impression of possible bias" is a sufficient ground for vacating an arbitration award. See 9 U.S.C. § 10(d), Commonwealth Coatings Corp. v. Continental Casualty Company, 393 U.S. 145 (1968); Sanko S.S. Company v. Cook Industries, Inc., 495 F.2d 1260, 1263-64 (2d Cir. 1973).

Not only did the arbitrators have a pecuniary interest in seeing to it that Mr. Honn did not receive compensatory damages for his defamation claim (or these arbitrators would be the subject of preemptory challenges by all brokerage firm attorneys in future cases and would not be able to earn future monies acting as arbitrators for the NASD), but the NASD itself had a pecuniary interest in directly assisting its members to avoid a flood of these costly disputes.

It has long been held that misconduct of a juror is sufficient grounds for setting aside a verdict. Even more so, misconduct of a court system, that changes an impartial arbitration forum into an advocate for a particular party (in this case brokerage firms), is certainly grounds for setting aside or vacating the arbitrators' decision in this matter.

As stated in Grahams Service, Inc. v. Teamsters Local 975, 700 F.2d 420, 422 (8th Cir. 1982), though arbitrators are not bound by formal rules of procedure and evidence. The

standard for judicial review of arbitration procedures is merely whether a party to an arbitration has been denied a fundamentally fair hearing. In this case, the lack of a fair forum is obvious.[1]

In Lee v. Chica, 983 F.2d 883 (8th Cir. 1993), in interpreting what constitutes misconduct which forms the basis for vacatur of an arbitrators' award, the Eighth Circuit Court stated that misconduct includes, "any behavior that would result in prejudice to one of the parties." Lee v. Chica, id., at 888, fn. 8. As this Court studies the facts underlying this Motion to Vacate, it will become obvious that the joint actions of the NASD arbitration forum, the NASD representative Craig Landauer, the NASD Case Administrator Sharon Kranz and the arbitrators all served to prejudice Plaintiff Brian Honn.

III. ARGUMENT

A. THE TESTIMONY OF AN NASD OFFICIAL SERVES AS A STRONG BASIS TO VACATE THE AWARD UNDER MINN. STAT. § 572.19, SUBDIVISIONS 1, 2, 3 AND 4.

1. The NASD panel of arbitrators allowed the Steichen Defendants to call an expert witness when none had been designated in response to Plaintiff Honn's Request for Information and Documents.

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[1] See Baar v. Tigerman, 140 Cal. App. 3rd 979 (Cal. 1983), where the court held that a party to an arbitration had a right to sue the arbitration forum for a failure to properly administer the arbitration proceedings. One can hardly think of a more egregious failure to properly administer NASD arbitration proceedings, than to assist an NASD representative in testifying when providing such testimony is contrary to the very rules of the NASD!

The NASD arbitration equivalent of Interrogatories and Document Requests is the Request for Information and Documents pursuant to Section 32(a) of the NASD Code of Arbitration Procedure. On December 20, 1993, Rebecca E. Bender, counsel to Plaintiff Honn, served Claimant's First Request for Documents and Information upon Respondents' counsel (Exhibit A to Bender Affidavit). On March 30, 1994, Steven E. Rau, counsel to the Steichen Defendants, responded to these Requests for Information and Documents (Exhibit B to Bender Affidavit).

Honn's Requests for Information No. 2 requests:

> Names, home addresses, business addresses and business phone numbers for any and all expert witnesses and identify the subjects about which they will opine and a brief statement of their opinions and the bases for these opinions.

The Steichen Respondents responded to this Request by stating, "The information will be provided 10 days prior to the hearing in this matter as required under NASD Code Section 32 (c)."

There is nothing in the NASD Code of Arbitration Procedure (a copy of which is attached as Exhibit C to the Bender Affidavit), which allows parties to delay in designating experts until the expert exchange required under Section 32(a).

Despite this failure by Respondents, through their counsel Mr. Rau, the arbitrators allowed Respondents' non-designated expert, the NASD's Craig Landauer, to testify.

2. <u>The Steichen Respondents failure to indicate in their Section 32(c) disclosure that they intended to call an expert witness and the arbitration panel's allowing of Respondents to nevertheless call Respondents' expert</u>

witness, undermined the fairness of the arbitration proceeding.

On May 19, 1994, on behalf of the Steichen Respondents, R.J. Steichen listed the witnesses which Respondents may call during their case in chief (Exhibit D to Bender Affidavit). Despite the statement by Respondents' counsel Rau that he would designate any expert witnesses 10 days before the hearing in accordance with Section 32(c) (see above), Mr. Rau did not designate any expert witness 10 days prior to the hearing. Nevertheless, the arbitrators allowed Respondents' expert witness, the NASD's Craig Landauer, to testify, though Respondents had twice failed to identify their expert witness.

3. The arbitrators' allowing the record to be reopened, after all Parties had agreed that it was closed, and after Respondents had indicated they did not intend to call an expert witness, serves as a basis to vacate the award.

The arbitration hearing in this matter was scheduled to last between June 7 and June 9 of 1994. Due to some scheduling problems involving the arbitrators' available time, all parties agreed on the record in the presence of the arbitrators, that the record was closed at the end of the arbitration day on June 9, 1994. (See partial transcript of June 9, 1994 hearing attached as Exhibit E to Bender Affidavit.) The parties agreed to reconvene on June 16, 1994, solely for the purpose of providing closing arguments.

Five days after the record had been closed pursuant to the agreement of the parties in the presence of the arbitrators, and two days before closing arguments were to take place, Respondents' counsel brought a motion to have a representative of the NASD's General Counsel's Office, Craig Landauer, testify on June 16, 1994, the date which had been

reserved for closing arguments to take place. The letter from Respondents' counsel Rau to Sharon Kranz of the NASD is attached as Exhibit F to the Bender Affidavit. Bender's response letter on behalf of Claimant Honn is attached as Exhibit G to the Bender Affidavit.

Despite Honn's objections, the NASD granted Respondents' motion to reopen the record and to allow an NASD official to testify in Respondents' case, which had been closed seven days earlier. The testimony of the NASD official, Craig Landauer was, according to the NASD \Case Administrator Sharon Kranz, to take place pursuant to the NASD panel's subpoena. (The letter granting this request by the Steichen Respondents is attached as Exhibit H to the Bender Affidavit.)

4. Despite the fact that the panel was given authority to sign a subpoena for NASD representative Craig Landauer to testify, the panel never executed such a subpoena, providing another indication of the prejudice, bias and corruption in this particular NASD proceeding.

The June 15, 1994 letter from Sharon Kranz to Rebecca E. Bender, indicating that the motion of Respondents' counsel Steven Rau "to reopen the record" is granted, contains a very key phrase. That letter states:

> The panel has agreed to sign the subpoena for Craig Landauer which should be prepared and forwarded to the NASD, attention Sharon A. Kranz.

No subpoena was ever prepared and forwarded to the NASD to the attention of Sharon Kranz. Rather, Mr. Rau, on behalf to the Respondents, served a subpoena to give testimony directly to Mr. Landauer, the day before he was to

give testimony. Though the NASD panel was to issue a subpoena to Mr. Landauer, Mr. Landauer testified at the arbitration proceeding without such a subpoena, and solely at the request of NASD member firm R.J. Steichen. (Subpoena signed by Steven Rau, counsel for Respondent and NASD member R.J. Steichen is attached as Exhibit I to Bender Affidavit.)

Mr. Landauer even stated on the record that the NASD expressed no opinion regarding the validity of the subpoena! (Partial transcript of NASD June 16, 1994 hearing at Exhibit J to Bender Affidavit. In other words, NASD representative Craig Landauer was testifying voluntarily in support of NASD member, R.J. Steichen.

5. There was extreme bias in having an NASD employee testify at an NASD arbitration, which serves as a basis to vacate this matter.

Even if identified, having an NASD employee testify as an expert on behalf of one of the parties in an NASD proceeding, where the NASD selects the arbitrators to hear a particular dispute, presents numerous layers of bias, prejudice and apparent, if not actual, corruption. As the NASD arbitration system holds itself out as being equivalent to a court system, having an NASD employee testify following the close of all testimony is equivalent to having one judge sitting in a courtroom, calling in a judge from the courtroom next door to provide some testimonial insight for the jury, while indicating that it is the defendants in the case which have called the judge to testify! Having an NASD official even proposed as a willing witness to testify for one party in an NASD arbitration, makes the party opposing such testimony (Mr. Honn), look as if he is trying to hide key evidence. Unfortunately for Mr. Honn, all he was seeking was a fair hearing.

On its face, it is clear that having a member of the court system testify as an expert for one party, no matter what he or she may say, provides a clear sense that the party who is utilizing the testimony of the court system representative is the party which is in the right. Though Mr. Landauer's responses to Plaintiff Honn's cross-examination of him supported Mr. Honn's claims against the Steichen Defendants, it was clear that the arbitrators were no longer listening to the content of what NASD employee Mr. Landauer had to say. Mr. Landauer, an NASD employee, was agreeing to testify, without a proper subpoena, for the Steichen Defendants. No one needed to say or could say anything more. The panel felt obliged to side with the NASD employee as they sat in an NASD arbitration.

Though Mr. Landauer admitted that he had never previously testified in an arbitration hearing before and that he had never testified on behalf of either an investor suing a brokerage firm or an individual broker (like Plaintiff Honn), suing an NASD member (like the Steichen Defendants), Honn's counsel Bender sought to establish with certainty the fact that NASD employees do not testify in private arbitration proceedings for, among other reasons, the strong bias explained above. Honn's counsel Bender also sought to determine if anyone other than a brokerage firm would be able to obtain the testimony, without proper subpoena, of an NASD employee.

Bender sent two letters to John Pinto of the National Association of Securities Dealers, Inc. in Washington, D.C., making this inquiry. (These letters are attached as Exhibit K to the Bender Affidavit.) In those letters, Bender referred to her representation of investors, individual brokers and brokerage firms, and sought to obtain the testimony of NASD representatives to assist all of her clients.

Not surprisingly, Bender received an official response from the National Association of Securities Dealers, Inc., from

an NASD Vice President in charge of Regional Attorneys/Enforcement. That gentlemen, William R. Schief, stated as follows:

> Dear Ms. Bender:
>
> In your recent letter to John Pinto you mentioned that you represented certain clients in numerous NASD arbitration proceedings and you asked how you would go about arranging for an NASD employee, such as regional counsel, assistant district administrator or an NASD representative who has drafted a particular notice to members to testify in your client's private arbitration proceedings.
>
> The NASD has a long-standing policy not to provide staff persons as so-called expert or technical witnesses in private civil litigation or in arbitration proceedings. Various reasons support this policy, including the overwhelming burden on the NASD staff if such testimony were provided, given the thousands of NASD arbitration proceedings each year. Moreover, our policy is identical to that of other self-regulatory organizations and administrative agencies, such as the Securities and Exchange Commission.
>
> I regret that we are unable to assist you in this regard.
>
> Very truly yours,
>
> William R. Schief
> Vice President Regional Attorney/Enforcement

(Exhibit L to Bender Affidavit.)

The very clear bias, prejudice and corruption in this particular arbitration matter was evident even prior to receiving Mr. Schief's October 28, 1994 letter. With this letter, it is clear that the NASD does not provide its staff people to testify in arbitration matters, even if properly subpoenaed. The fact that an NASD representative, Mr. Landauer, who drafted a particular Notice to NASD Members was allowed to testify when there had been no appropriate identification of this expert in a timely manner under the NASD Rules, and when the arbitrators had closed the taking of testimony in the proceeding, and when the expert appeared without proper subpoena, makes it clear that this case is indeed an unusually biased one and that this arbitrators' decision must be vacated.

As set forth above, unfortunately the biased colors of the NASD, as an advocate of brokerage firms like R.J. Steichen, undermined the goals of its sister organization, the NASD Arbitration forum. In the interest of protecting its brokerage firm members from large verdicts, the NASD admittedly crossed the line in this one. They broke their own policies and rules and the panel of arbitrators allowed it to happen.

B. THE NASD CASE COORDINATOR'S REQUESTING A JOB FROM THE SECURITIES INDUSTRY PANELIST SERVED TO BIAS AND CORRUPT THE PROCEEDING.

As if the bias and prejudice involving the testimony of Craig Landauer was not enough, Mr. Honn's case was hit with another fatal blow. Under the NASD Rules, the arbitration panel for a dispute between a broker and his former employer brokerage firm is made up of three individuals. In cases involving misrepresentation, defamation and breach of

contract, also, in accordance with the NASD Rules, two persons not affiliated with the securities industry and one person designated as still being affiliated with the securities industry decide the dispute between the parties.

In the case at bar, James Kaiser, a former Paine-Webber manager, was designated by the NASD as the one arbitrator still affiliated with the securities industry, who was sitting on the panel in this matter.

When Brian Honn was in attendance at the arbitration hearing on June 16, 1994, the arbitrators took a break from the proceedings taking place in the Lake Harriet Room at the Marquette Hotel in Minneapolis. During that break, outside of the Lake Harriet Room, Mr. Honn overheard Sharon Kranz, the Chicago NASD Case Administrator, and an NASD employee, talking in confidence to James Kaiser, the securities industry arbitrator on the panel deciding Mr. Honn's case.

Sharon Kranz, whose position is equivalent to that of a judge's law clerk, was asking Mr. Kaiser, one of the arbitrators (equivalent to a jury member), if he knew of any jobs for her in the securities industry. Ms. Kranz went on to state to Mr. Kaiser that she would like to leave her position at the NASD to work in a compliance/legal capacity at a brokerage firm (Honn Affidavit, ¶¶ 7 - 10).

Mr. Kaiser, who was paid to decide arbitration matters impartially, was being asked by a representative of the supposed impartial sponsoring entity to help her find a job in the securities industry! Mr. Kaiser replied that he would keep his eyes open for opportunities for Ms. Kranz of the NASD and would let her know if he heard of anything. (Honn Affidavit, ¶ 11.)

This behavior is the equivalent of a judge's law clerk approaching a member of a jury seeking employment from him or requesting another favor. This conduct wholly undermined the fairness of the arbitration proceeding and served to prejudice the rights of Mr. Honn. One of the primary roles of

the NASD Case Administrator (Sharon Kranz) when she attends hearings in person, is to see to it that no favors are requested or granted by the trier-of-fact and that the hearing is conducted in an impartial manner. As Ms. Kranz is an NASD attorney and source person who responds to the panel's questions, in order for the process to be fair and impartial, she must be an impartial source of information who owes nothing to the industry or its members, one of whom, R.J. Steichen, Mr. Honn was suing.

For example, it is Ms. Kranz who is the liaison between the arbitration panel and the parties' counsel when motions such as Respondents' motion to reopen the hearing are brought, which allowed the testimony of Respondents' unidentified expert, NASD employee Craig Landauer, to testify. There is clearly too close of a professional connection between the NASD Case Administrator and the arbitration panel deciding a dispute for favors to be requested and/or granted between the industry-run NASD forum and the industry panelist (Mr. Kaiser), when Mr. Honn is required by the industry to have his dispute against an industry member (R.J. Steichen) arbitrated in an NASD proceeding. (Honn Affidavit, ¶¶ 12 - 14.)

C. THE LANGUAGE OF THE ARBITRATORS' DECISION MAKES IT CLEAR THAT THERE WAS EVIDENT PARTIALITY, WHICH ALSO SUPPORTS THIS MOTION TO VACATE

John C. Deiter, Ph.D. of the economic consulting firm of Deiter, Stephens & Durham, was one of the three expert witnesses who testified in Brian Honn's arbitration case. Dr. Deiter prepared a report using accepted economic principles, which determined the present value damage which had been caused to Brian Honn due to the erroneous Form U-5 prepared by R.J. Steichen when Mr. Honn voluntarily left the

firm. (Exhibit M to Bender Affidavit.) In other words, Dr. Deiter provided figures reflecting the damage to Mr. Honn, if the arbitrators made a finding that the information contained on the Form U-5 and which is automatically distributed and available to investors throughout the country (via the CRD System), was inaccurate and in need of amendment. No contrary damage figures were presented by the Steichen Respondents.

In the arbitrators' decision in the Honn case, they make the finding upon which Dr. Deiter's analysis was premised, namely:

> 6. Respondent R.J. Steichen shall, in addition to the above, promptly cause to be prepared and filed with the NASD, CRD Amendments to Claimant's form U-5 in accordance with the Rules of Fair Practice and consistent with factual information known by Respondent R.J. Steichen.

(Exhibit N to Bender Affidavit.)

Nevertheless, the arbitrators awarded $2,437.50 in compensatory damages to Mr. Honn, rather than the $559,000 to $910,000 which Dr. Deiter testified was the present value of financial losses (compensatory damages) to Mr. Honn from lost past wages and diminution of future earning capacity in the securities industry. This reduction of damages by at least 229 percent could only represent evident partiality and require the award to be vacated. What this panel is saying is, "we know you were damaged, but you will receive no damages."

In Tinaway v. Merrill Lynch & Co., Inc., 658 F. Supp. 576 (S.D.N.Y. 1987), the court vacated an award where the damages were reduced by 95 percent. Surely in this case, this Court must do the same.

IV. CONCLUSION

All of the three above reasons in and of themselves would provide sufficient bases for vacating the arbitrators' award in this matter. When one looks at all three of these issues as they occurred, in one arbitration, the arbitrators' award in this matter is clearly one which the legislature was thinking of when it stated "the court shall vacate an award," in Minn. Stat. § 572.19.

Even in cases which are politically sensitive, parties deserve fair and unbiased proceedings. Plaintiff Brian Honn respectfully requests that this Court vacate the Arbitrators' Decision and remand the case to the New York City Office of NASD Arbitration, to be handled from that location with out-of-state arbitrators who can provide Mr. Honn with the hearing to which he is entitled.

Dated: November 17, 1994

s/s

REBECCA E. BENDER & ASSOCIATES, P.A.
Rebecca E. Bender
Minnesota Law Center
514 Nicollet Mall, Suite 570
Minneapolis, Minnesota 55402-1021
(612) 332-6220

ATTORNEYS FOR PLAINTIFF
BRIAN L. HONN

CASE TYPE: MISREPRESENTATION/
DEFAMATION/CONTRACT

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Claimant/Plaintiff,

Court File No. CT94-015904

v.

AFFIDAVIT OF
REBECCA E. BENDER

R.J. Steichen and Company
and John E. Feltl,

Respondents/Defendants.

STATE OF MINNESOTA)
)ss.
COUNTY OF HENNEPIN)

I, Rebecca E. Bender, being first duly sworn under oath, state and allege as follows:

1. I am counsel to Plaintiff Brian Honn for purposes of this Motion to Vacate the Arbitrators' Award pursuant to Minn. Stat. § 572.19 and 9 U.S.C. § 10. I acted as counsel to Mr. Honn in his National Association of Securities Dealers, Inc. ("NASD") arbitration against R.J. Steichen and Company and John E. Feltl. I have been licensed to practice law in the State of Minnesota since October of 1982.

2. In filing this Motion to Vacate the Arbitrators' Award, I am not suggesting that the NASD arbitration process or procedure, generally, is tainted. Rather, based upon my representation of investors, individual brokers and broker-dealers over the last 12 years and my having represented parties in the last one and one-half years in 17 separate NASD securities arbitrations, it is clear that this particular NASD proceeding was tainted and requires the Arbitrators' decision to be vacated.

3. In my 12 years of practicing almost exclusively in the area of securities litigation and arbitration, I have never brought a motion to vacate an arbitration panel's award. I do not take such a motion lightly and am confident that this is an exceptional case which justifies the Arbitrators' Award being vacated and this matter being heard in a fair, impartial, unbiased forum which does not serve to prejudice Mr. Honn's rights.

4. The Honn v. Steichen arbitration was a potential negative precedent setting case for brokerage firms. I received numerous calls from attorneys (some outside of Minnesota) after the hearing, inquiring as to whether I had yet received a decision in the case. I was even contacted by a Minnesota business periodical to discuss the case. Through these various communications, it became clear to me that brokerage firms, (some of which are my clients!) were very concerned about the outcome of the Honn v. Steichen case.

5. The Honn v. Steichen matter was concluded on June 16, 1994. The NASD Code of Arbitration Procedure (Section 41 (d)) states that the arbitrators shall endeavor to render an award within 30 business days from the date the record is closed.

6. As I receive decisions on behalf of my clients in NASD arbitrations no later than 45 days after the end of a hearing, I began calling Sharon Kranz, NASD Case Administrator, to inquire as to whether the decision had been

mailed, beginning July 18, 1994. During July and August, I was told various conflicting stories by Sharon Kranz. First, in July, I was told that two arbitrators had signed and that Ms. Kranz was waiting for the third signature. Then I was told that an arbitrator had a question. Then I was told it had been signed in early August and was being sent. Then I was told no one had signed the decision. The final arbitration award which I received on September 8, 1994, was signed on August 19-29, 1994, 73 days after the hearing.

7. Attached to this Affidavit are true and correct copies of the following documents:

Exhibit A - December 20, 1993 Claimant's First Request for Documents and Information

Exhibit B - March 30, 1994 Respondents' Responses to Claimant's Request for Information and Documents

Exhibit C - NASD Code of Arbitration Procedure

Exhibit D - May 19, 1994 Steichen Respondents' list of witnesses

Exhibit E - Partial Transcript of June 9, 1994 hearing in which parties agree that the record has been closed

Exhibit F - June 14, 1994 letter from Steichen Respondents' counsel to NASD's Case Administrator Sharon Kranz requesting that record be reopened

Exhibit G - June 14, 1994 response letter from Honn's counsel Bender to NASD's Sharon Kranz

Exhibit H - June 15, 1994 letter from Sharon Kranz of the NASD granting the Steichen Respondents' request to reopen the record, NASD panel allowed to sign subpoena

Exhibit I - Subpoena signed by Rau, counsel to Steichen Respondents, and served by telefax upon NASD representative Landauer

Exhibit J - Partial Transcript of June 16, 1994 hearing in which NASD's Landauer admits he is testifying voluntarily at Steichen's request and Bender continues to object to Landauer's testimony

Exhibit K - Letters sent by Honn's counsel Bender to John Pinto of the National Association of Securities Dealers, Inc. at its headquarters office in Washington, D.C.

Exhibit L - Letter from NASD Officer in charge of regional attorneys/enforcement (William Schief) to Bender stating that the NASD does not provide staff persons to testify in private civil litigation

Exhibit M - Economic Report of John C. Deiter, Ph.D.

Exhibit N - Arbitrators' Decision in the Honn v. Steichen NASD arbitration

Exhibit O - Article from Wall Street Journal indicating award of $1,500,000 to firm employee who sued former employer for defamation based upon inaccurate information on Form U-5

8. I have spent 30 hours researching and drafting these Motion to Vacate papers, at my hourly rate of $145.00 per hour ($4,350.00). Mr. Honn has also incurred a $215.00 fee for having the NASD make copies of hearing tapes, a $135.00 filing fee and $105.00 in copies, postage, messenger and Federal Express expenses in pursing this motion for a total of $4,805.00 in fees and expenses.

FURTHER YOUR AFFIANT SAITH NOT.

s/s
Rebecca E. Bender

Subscribed and sworn to before
me this 17th day of November, 1994.

s/ Janice Murray
Notary Public

Exhibit A

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

Brian L. Honn,

Claimant,

v.

CLAIMANT'S REQUEST FOR INFORMATION AND DOCUMENTS

R.J. Steichen and Company,
John E. Feltl and John Does,

Respondents.

TO: Respondents and their counsel, Steven E. Rau, Esquire, Maun & Simon, 2300 World Trade Center, 30 East 7th Street, St. Paul, Minnesota 55101-4904

Claimant requests copies of the following documents and responses to the following Requests for Information within thirty-three (33) days from the date of this Request. Claimant will pay for the reasonable costs of copying the documents requested below. Please forward the responsive documents and information to Claimant in care of his counsel, Rebecca E. Bender & Associates, P.A., Minnesota Law Center, 514 Nicollet Mall, Suite 570, Minneapolis, Minnesota 55402.

If any of the documents referred to below were once in Respondents' possession, custody or control but are no longer in their possession, custody or control, identify such documents by stating the type of document, the date, the author, the addressee, and the reason Respondents no longer have possession or control of such documents. If a privilege is claimed on any document requested below, identify such

document and the basis for the claim of privilege with sufficient specificity to allow Claimant an opportunity to object to the claim of privilege.

Each Respondent shall respond separately to these requests as each Respondent clearly has his (its) own responsive documents and information.

DEFINITIONS AND INSTRUCTIONS

As used herein, the following terms shall have the meaning and be interpreted as set forth below:

"Communication" means any oral or written statements, notes, or utterances of any nature made to or by Respondents including, but, not limited to, correspondence, notes, reports, conversations, dialogues, discussions, interviews, consultations, agreements and other understandings.

"Complaints" include all customer and/or broker complaints (written or oral), demand letters, lawsuits, arbitration claims, administrative proceedings, or investigations or inquiries, formal or informal, by any governmental, quasi-governmental or self-regulatory organization including, but not limited to, the SEC, NASD, NYSE, AMEX, MSRB, CBOE, PSE and state regulatory authorities.

"Documents" is intended to have a meaning and definition coextensive with that contained in Rule 34 (a) (1) of the Federal Rules of Civil Procedure.

"Respondents" shall refer to R.J. Steichen and Company (hereinafter "Steichen") (and any predecessor, successor or affiliate organizations), as well as John E. Feltl. Respondents shall also be deemed to include each of Steichen's directors, officers, shareholders, partners, parents, affiliates, subsidiaries, employees, agents or representatives, including their attorneys, or any employee, agent, investigator or representative of their attorneys.

Unless otherwise stated, Claimant is seeking information and documents from 1990 through the present.

REQUESTS FOR PRODUCTION OF DOCUMENTS

In accordance with the instructions and definitions set forth above, please produce the following documents:

1. Any and all documents referring to, relating to or referencing Claimant Honn.
2. Any and all documents containing the signature of Claimant Honn.
3. Any and all drafts and final versions of employment agreements and/or policies for employees and/or independent contractors with Steichen.
4. Any and all documents which you claim govern and/or impact the employment relationship which existed between Claimant and Respondents.
5. Any and all documents referring, referencing or relating to payouts, commissions, compensation and/or salary structure for independent contractor brokers at Steichen, including but not limited to documents defining the "dealer's charge" and/or any other charges which were deducted from gross commission amounts.
6. Any and all documents referring, referencing or relating to Brian Honn's compensation while at Steichen.
7. Any and all documents referring, referencing or relating to training of Steichen brokers, including but not limited to any promises of training, any training hand-outs or booklets, any training outlines, etc.

allotment into Feltl's inventory two days before the public offering of Eltrax.

9. Any and all documents referencing, referring to or relating to Steichen deducting $1,824.53 from Honn's paycheck, as payment for the Blaz cancelled trade of Eltrax.

10. Any and all documents referring, referencing or relating to the assignment of 5,000 shares of Eltrax on three different occasions from the firm's inventory to Brian Honn's personal inventory, after the Eltrax public offering, including but not limited to the reasons for such assignment.

11. Any and all documents referring, referencing or relating to Steichen's deduction of $2,731.54 from Honn's personal account (Account No. 262400-0) at Steichen, including but not limited to any documents authorizing such deduction.

12. Any and all documents which refer to, relate or reference the investigation and/or inquiry conducted by Steichen prior to completing the U-5 Form for Brian Honn.

13. Any and all documents referring, referencing or relating to the agreement between Honn and Steichen for warrants owed on Unimax and Bossworks and for one-half of the $4,875.00 in private placement commissions earned, or $2,437.50.

14. Any and all internal compliance manuals and policy statements for Steichen brokers, both employees and/or independent contractors.

15. Any and all documents referring, relating to or referencing the solicitation by Steichen employees or agents of any customers who did business with Mr. Honn while he was affiliated with Steichen.

16. Any and all commission runs for Brian Honn during the entire period he was affiliated with Steichen.

17. Any and all documents referring, relating to or mentioning the introductory training program for Brian Honn and/or other employees or independent contractors at Steichen.

18. Any and all copies of notices of training sessions at Steichen.

19. Copies of any and all complaints, as defined herein, brought or intended to be brought against Steichen and/or any of its principals from 1988 through the present.

20. Copies of documents referencing any and all disciplinary actions, inquiries or investigations in which Steichen and/or any of its principals have been found liable for any wrongdoing or have agreed to settle the claims against them, from 1983 through the present.

21. Copies of any and all documents referencing state regulatory investigations of Steichen and/or any of its principals, from 1983 through the present.

22. Any and all records of Richard Heise relating to, referencing or referring to finder's warrants generally and/or for the Bossworks issuance.

23. Any and all diaries, calendars and/or daybooks for Respondent Feltl and/or his wife and/or Steichen's compliance officer and/or Steven Kloyda.

REQUESTS FOR INFORMATION

The following information is also requested within 33 days from the date of this request:

1. Names, home addresses, business addresses and business phone numbers for any and all witnesses you intend to call at the arbitration in this matter.

2. Names, home addresses, business addresses and business phone numbers for any and all expert witnesses and identify the subjects about which they will opine and a brief statement of their opinions and the bases for these opinions.

3. A list of all documents which you intend to introduce at the arbitration hearing in this matter.

4. Any and all defenses you intend to raise at the arbitration hearing in this matter.

5. Any and all facts stated within Claimant's Statement of the Claim which you dispute, and the reason(s) for your disputing these claims and facts.

6. Names, home addresses, business addresses and last known place of employment for each sales assistant and/or secretary who has worked with Respondent Feltl from 1983 through the present.

7. Names, home addresses, business addresses and last known place of employment for the Operations Managers, Branch Managers and Compliance Officers for Steichen from 1983 through the present.

8. Please provide names, last known business addresses and telephone numbers for any and all independent contractors and/or employees of Steichen who left the firm from 1989 through the present.

9. Indicate when Mary Jo Feltl passed her principal's examination.

10. Indicate when Beth Feltl passed her series 7 examination.

11. Indicate the medications that John E. Feltl was taking during the relevant time period.

12. Indicate the reasons, including but not limited to regulatory findings, suggestions and/or sanctions, which resulted in John Feltl selling or relinquishing his partial ownership of a bank.

13. Indicate the employment background of Steven Kloyda, including but not limited to where he worked prior to employment at Steichen and the securities examinations taken and passed by Kloyda.

14. Indicate the employment background of Mike Sherman, including but not limited to where he worked prior to employment at Steichen and the securities examinations taken and passed by Sherman.

15. Describe the reasons why 5,000 shares of Eltrax were assigned on three different occasions from Steichen's inventory to Brian Honn's personal inventory.

16. List the dates of any and all discussions held between John Feltl and Brian Honn regarding compensation and/or training prior to and after Honn commenced work with Steichen, as well as listing the names of the persons who were parties to or overheard these discussions.

Dated: December 20, 1993

s/s

REBECCA E. BENDER & ASSOCIATES, P.A.
Rebecca E. Bender, #139075
Minnesota Law Center
514 Nicollet Mall, Suite 570
Minneapolis, Minnesota 55402
(612) 332-6220

ATTORNEYS FOR CLAIMANT
BRIAN L. HONN

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Rebecca E. Bender, being duly sworn, deposes and says that on the 20th day of December, 1993, she served the Claimant's First Request for Documents and Information upon Respondents' counsel, by placing a true, and correct copy in an envelope and depositing the same in the U.S. mail at Minneapolis, Minnesota addressed as follows:

Steven E. Rau, Esq.
Maun & Simon
2300 World Trade Center
30 East 7th Street
St. Paul, MN 55101-4904

s/s
Rebecca E. Bender

Subscribed and sworn to before me
this 20th day of December, 1993.

s/Janice Murray
Notary Public

Exhibit B

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

Brian L. Honn,

Claimant,

v.

R.J. Steichen and Company, John E. Feltl and John Does,

Respondents.

RESPONDENT'S RESPONSES TO CLAIMANT'S REQUEST FOR INFORMATION

TO: Claimant and his counsel, Rebecca E. Bender, Rebecca E. Bender & Associates, P.A., Minnesota Law Center, 514 Nicollet Mall, Suite 570, Minneapolis, Minnesota 55402-1021.

RESPONSES TO REQUESTS FOR INFORMATION

1. Names, home addresses, business addresses and business phone numbers for any and all witnesses you intend to call at the arbitration in this matter.

RESPONSE NO. 1:

This information will be provided 10 days prior to the hearing in this matter as required under NASD Code § 32(c).

2. Names, home addresses, business addresses and business phone numbers for any and all expert witnesses and

identify the subjects about which they will opine and a brief statement of their opinions and the bases for these opinions.

RESPONSE NO. 2:
See Answer to Request No. 1.

3. A list of all documents which you intend to introduce at the arbitration hearing in this matter.

RESPONSE NO. 3:
See Answer to Request No. 1.

4. Any and all defenses you intend to raise at the arbitration hearing in this matter.

RESPONSE NO. 4:
See Answer of Respondents R. J. Steichen and Company and John E. Feltl.

5. Any and all facts stated within Claimant's Statement of the Claim which you dispute, and the reason(s) for your disputing these claims and facts.

RESPONSE NO. 5:
See Response No. 4.

6. Names, home addresses, business addresses and last known place of employment for each sales assistant and/or secretary who has worked with Respondent Feltl from 1983 through the present.

RESPONSE NO. 6:
Attached as Exhibit A.

7. Names, home addresses, business addresses and last known place of employment for the Operations Managers, Branch Managers and Compliance Officers for Steichen from 1983 through the present.

RESPONSE NO. 7:
This information is being compiled and will be provided shortly, although Respondents do not believe such information is relevant to these proceedings in any way. The information will be provided but Respondents are not waiving their objection to this information.

8. Please provide names, last known business addresses and telephone numbers for any and all independent contractors and/or employees of Steichen who left the firm from 1989 through the present.

RESPONSE NO. 8:
Attached as Exhibit B.

9. Indicate when Mary Jo Feltl passed her principal's examination.

RESPONSE NO. 9:
December 15, 1992.

10. Indicate when Beth Feltl passed her Series 7 examination.

RESPONSE NO. 10:
April 6, 1993.

11. Indicate the medications that John E. Feltl was taking during the relevant time period.

RESPONSE NO. 11:
None.

12. Indicate the reasons, including but not limited to regulatory findings, suggestions and/or sanctions, which resulted in John Feltl selling or relinquishing his partial ownership of a bank.

RESPONSE NO. 12:
This request is objected to as irrelevant as to any of the claims asserted in this matter. Nevertheless and without waiving this objection, Mr. Feltl simply chose to relinquish his ownership position, and this decision was not related to any regulatory findings or suggestions. In fact, there were no regulatory findings or suggestions ever made with respect to this ownership position.

13. Indicate the employment background of Steven Kloyda, including but not limited to where he worked prior to employment at Steichen and the securities examinations taken and passed by Kloyda.

RESPONSE NO. 13:
Mr. Kloyda is not an employee of R.J. Steichen, and therefore, R.J. Steichen is not privy to this information.

14. Indicate the employment background of Mike Sherman, including but not limited to where he worked prior to employment at Steichen and the securities examinations taken and passed by Sherman.

RESPONSE NO. 14:
See the attached resume of Mike Sherman.

15. Describe the reasons why 5,000 shares of Eltrax were assigned on three different occasions from Steichen's inventory to Brian Honn's personal inventory.

RESPONSE NO. 15:

See Answer of Respondents R.J. Steichen and Company and John E. Feltl.

16. List the dates of any and all discussions held between John Feltl and Brian Honn regarding compensation and/or training prior to and after Honn commenced work with Steichen, as well as listing the names of the persons who were parties to or overheard these discussions.

RESPONSE NO. 16:

The dates of any discussions are unknown. Mary Jo Feltl was present on some of the occasions as was John Feltl.

Dated: March 30, 1994

MAUN & SIMON, PLC

s/s

Albert A. Woodward (#118801)
Steven E. Rau (#147990)
2300 World Trade Center
Saint Paul, Minnesota 55101-4904
612-229-2900

COUNSEL FOR RESPONDENT
R. J. STEICHEN AND COMPANY

3/30/94,SER,49499_1S

RJ
Steichen
& Company
Investment Securities
Established 1929

February 3, 1995

The following is the past assistants for Jack Feltl:

Shelley Geenen
3017 Irving Ave No
Minneapolis, Mn 55441

RJSO116

EXHIBIT A

RJ
Steichen
& Company
Investment Securities
Established 1929

January 31, 1994

Registered representatives that have left R. J. Steichen.

Charles R. Haas Jr.
PO Box 14
Hugo, Mn. 55038

Larry Jessen
1901 Rachel Drive
Alexandria, Mn 56308

Stephen C. Searl
1505 Burnsville Pkwy #303
Burnsville, Mn 553

Jon O Pederson
3433 44th Ave So
Minneapolis, Mn 55

Steve Immel
112 Magnolia
Casper, Wyoming 82

Joel Phillippi
4520 Morningside R
St. Louis Park, Mn 55416

Lane Barton
6800 Limerick Lane
Edina, Mn 55439

RJS0080

MICHAEL B. SCHIERMAN
4733 KENT STREET
SHOREVIEW, MINNESOTA 55126
(612) 483-0958

EDUCATION: BS, College of St. Thomas, 1977. Major in accounting. CPA, Minnesota

EXPERIENCE:

1991 to 1993: Chief Financial Officer of Wave Technologies Corporation, a development stage enterprise manufacturing a high speed time measurement device.

Duties include strategic planning, budgeting, development of a manufacturing cost system, preparation of monthly financial statements, preparation of corporate tax payroll tax returns, general accounting, fund-raising and shareholder relations.

Also wrote two separate private placement memorandums for the sale of equity securities, in efforts to raise over $2,000,000.

1985 to 1991: Controller with S & T Office Products, Inc., a commercial office furniture and supplies distributor with sales in excess of $25,000,000. Sales in 1985 were $9,000,000.

Responsible for administration of accounting and data processing departments. Included preparation and

review of monthly financials, budgeting and development of internal accounting and management systems.

Developed new commission plans to meet the needs of a changing marketplace. This resulted in a significant increase in service revenues higher commissions for the salespeople and improved net earnings.

Recommended changes in warehouse operations that greatly improved service to the customer and significantly reduced operating costs. Warehouse expense dropped from 10.5% to 5.3% of sales.

Reviewed several companies for possible acquisition and assisted in the purchase of two companies.

Secured bank financing and negotiated operating lines of credit. Maintained excellent banking relationship, even in periods of poor financial performance and rapid growth.

Assisted salespeople in acquiring major new accounts.

Developed and implemented a 401(k) plan and was the plan administrator.

Evaluated and selected a software company for development of a new computer system. After completing design phase, the system was installed in December, 1990.

1984 to 1985	Audit manager with McGladrey and Pullen, Certified Public Accountants.
	In addition to client responsibilities, was responsible for scheduling audit staff of approximately forty.
1978 to 1984	Staff accountant and in-charge with McGladrey and Pullen, Certified Public Accountants.
	Performed audits of manufacturers, hospitals, retail and distribution companies. Also involved in several audits to detect extent of fraudulent activities.
	Was assigned to many audits with difficult clients because of my relationship skills.
Activities:	1989 chairman of the Legislative policy committee with the Minnesota Society of CPA's. Vice-chair in 1988 and 1987.
	Chairman in 1988 and 1987 of the Administrative committee at St. Odilia parish in Shoreview, MN
	Currently serving on the board of the North Suburban Soccer Association and am involved in youth activities in the North suburban area.
Comment:	I'm interested to find a position that will reward hard work and ability with new challenges. Would like to utilize my analytical and interpersonal skills.

CODE OF ARBITRATION PROCEDURE

December 1993

Exhibit C

A-48

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[Code adopted effective November 1, 1968; amended effective February 13, 1992.]

PART I. ADMINISTRATIVE PROVISIONS

Matters Eligible for Submission

Sec. 1. This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII, Section 1 (a)(3) of the ByLaws of the National Association of Securities Dealers, Inc., (the Association) for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, with the exception of disputes involving the insurance business of any member which is also an insurance company:

(1) between or among members;

(2) between or among members and public customers, or others; and

(3) between or among members, registered clearing agencies with which the Association has entered into an agreement to utilize the Association's arbitration facilities and procedures, and participants, pledges, or other persons using the facilities of a registered clearing agency, as these terms are defined under the rules of such a registered clearing agency. [Amended effective May 7, 1991.]

National Arbitration Committee

Sec. 2. The Board of Governors of the Association, following the annual election of members to the Board, shall appoint a National Arbitration Committee of such size and composition, including representation from the public at large, as it shall deem appropriate and in the public interest. The Chairman of the Committee shall be named by the Chairman of the Board. The said Committee shall establish and maintain a pool

of arbitrators composed of persons from within and without the securities industry.

The Committee shall have the authority to establish appropriate rules, regulations, and procedures to govern the conduct of all arbitration matters before the Association. All rules, regulations, and procedures and amendments thereto promulgated by the Committee must be by a majority vote of all the members of the said Committee. It also shall have such other power and authority as is necessary to effectuate the purposes of this Code.

The Committee shall meet at least once each year and at such other times as are deemed necessary by the Committee.

Director of Arbitration

Sec. 3. The Board of Governors of the Association shall appoint a Director of Arbitration who shall be charged with the performance of all administrative duties and functions in connection with matters submitted for arbitration pursuant to this Code. He shall be directly responsible to the National Arbitration Committee and shall report to it at periodic intervals established by the Committee and at such other times as called upon by the Committee to do so.

Composition and Appointment of Panels

Sec. 4. The Director of Arbitration shall compose and appoint panels of arbitrators from the existing pool of arbitrators of the Association to conduct the arbitration of any matter which shall be eligible for submission under this Code. The Director of Arbitration may request that the Executive Committee of the National Arbitration Committee undertake the composition and appointment of a panel or undertake consultation with the Executive Committee regarding the composition and appointment of a panel in any circumstance where he determines such action to be appropriate.

• • •Resolution of the Board of Governors

RESOLVED that all persons serving on panels of arbitrators pursuant to Section 4 of the Association's Code of Arbitration Procedure shall be paid an honorarium for each hearing session in which they participate while in the performance of said duties.

The honorarium shall be $150 for a single session, $225 for a double session, $50 for travel to a canceled hearing, and $50 per day additional honorarium to the chairperson of the panel. The honorarium for a case not requiring a hearing is $75 per case.

(Resolution adopted effective June 14,1977; amended May 30, 1980; amended February 8, 1982; amended January 14, 1987.)

Non-Waiver of Association Objects and Purposes

Sec. 5. The submission of any matter to arbitration under this Code shall in no way limit or preclude any right, action, or determination by the Association which it would otherwise be authorized to adopt, administer, or enforce.

Legal Proceedings

Sec. 6. No party shall, during the arbitration of any matter, prosecute or commence any suit, action, or proceeding against any other party touching upon any of the matters referred to arbitration pursuant to this Code.

Amendment, Modification, Or Cancellation of Code

Sec. 7. This Code may, upon a majority vote of the Board of Governors, be altered, amended, modified, or canceled.

PART II. INDUSTRY AND CLEARING CONTROVERSIES

Required Submission

Sec. 8. (a) Any dispute, claim, or controversy eligible for submission under Part I of this Code between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), shall be arbitrated under this Code, at the instance of:

(1) a member against another member;

(2) a member against a person associated with a member or a person associated with a member against a member; and,

(3) a person associated with a member against a person associated with a member.

(b) Any dispute, claim, or controversy involving an act or failure to act by a clearing member; a registered clearing agency; or participants, pledgees, or other persons using the facilities of a registered clearing agency, under the rules of any registered clearing agency with which the Association has entered into an agreement to utilize the Association's arbitration facilities and procedures shall be arbitrated in accordance with such agreement and the rules of such registered clearing agency.

Composition of Panels

Sec. 9. (a) Except as otherwise provided in Section 10 of the Code, in all arbitration matters between or among members and/or persons associated with members, and where the amount in controversy does not exceed $30,000, the Director of Arbitration shall appoint a single arbitrator to decide the matter in controversy. The arbitrator chosen shall be from the securities industry. Upon the request of a party in its initial filing or the arbitrator, the Director of Arbitration shall appoint

a panel of three (3) arbitrators, all of whom shall be from the securities industry.

(b) In all arbitration matters between or among members and/or persons associated with members and where the amount in controversy exceeds $30,000, a panel shall consist of three arbitrators, all of whom shall be from the securities industry.

[Amended effective May 10, 1989.]

Simplified Industry Arbitration

Sec. 10. (a) Any dispute, claim, or controversy arising between or among members or associated persons submitted to arbitration under this Code involving a dollar amount not exceeding $10,000, exclusive of attendant costs, shall be resolved by an arbitration panel constituted pursuant to the provisions of subsection (1) hereof solely upon the pleadings and documentary evidence filed by the parties, unless one of the parties to the proceeding files with the Office of the Director of Arbitration within ten (10) business days following the filing of the last pleading a request for a hearing of the matter.

(1) In any proceeding pursuant to this section, an arbitration panel shall consist of no fewer than one (1) but no more than three (3) arbitrators, all of whom shall be from within the securities industry.

(2) Notwithstanding the provisions of this section, any member of an arbitration panel constituted pursuant to this section shall be authorized to request the submission of further documentary evidence in a proceeding and any such panel may by majority vote call and conduct a hearing if such is deemed to be necessary.

(b) All awards rendered in proceedings pursuant to subsection (a) hereof shall be made within thirty (30) business days from the date the arbitrators review all of the written statements, documents, and other evidentiary material filed by the parties and declare the matter closed.

[Amended effective May 10, 1989.]

Applicability of Uniform Code

Sec. 11. Except as otherwise provided in this Part, the rules and procedures applicable to arbitrations concerning industry and clearing controversies shall be those set forth hereinafter under Part III.

PART III. UNIFORM CODE OF ARBITRATION

Required Submission

Sec. 12. (a) Any dispute, claim, or controversy eligible for submission under Part I of this Code between a customer and a member and/or associated person arising in connection with the business of such member or in connection with the activities of such associated persons shall be arbitrated under this Code, as provided by any duly executed and enforceable written agreement or upon the demand of the customer.

(b) Under this Code, the Director of Arbitration, upon approval of the Executive Committee of the National Arbitration Committee or the National Arbitration Committee, shall have the right to decline the use of its arbitration facilities in any dispute, claim, or controversy, where, having due regard for the purposes of the Association and the intent of this Code, such dispute, claim, or controversy is not a proper subject matter for arbitration.

(c) Claims which arise out of transactions in a readily identifiable market may, with the consent of the Claimant, be referred to the arbitration forum for that market by the Association.

[Amended effective February 2, 1992.]

(d) Class Action Claims.

(1) A claim submitted as a class action shall not be eligible for arbitration under this Code at the Association.

(2) Any claim filed by a member or members of a putative or certified class action is also ineligible for arbitration at the Association if the claim is encompassed by a putative or certified class action filed in federal or state court, or is ordered by a court to an arbitral forum not sponsored by a self-regulatory organization for class-wide arbitration. However, such claims shall be eligible for arbitration in accordance with Section 12(a) or pursuant to the parties' contractual agreement, if any, if a claimant demonstrates that it has elected not to participate in the putative or certified class action or, if applicable, has complied with any conditions for withdrawing from the class prescribed by the court.

Disputes concerning whether a particular claim is encompassed by a putative or certified class action shall be referred by the Director of Arbitration to a panel of arbitrators in accordance with Section 13 or Section 19 of the Code, as applicable. Either party may elect instead to petition the court with jurisdiction over the putative or certified class action to resolve such disputes. Any such petition to the court must be filed within ten business days of receipt of notice that the Director of Arbitration is referring the dispute to a panel of arbitrators.

(3) No member or associated person shall seek to enforce any agreement to arbitrate against a customer who has initiated in court a putative class action or is a member of a putative or certified class with respect to any claims encompassed by the class action unless and until: (A) the class certification is denied; (B) the class is decertified; (C) the customer is excluded from the class by the court; or (D) the customer elects not to participate in the putative or certified class action or, if applicable, has complied with any conditions for withdrawing form the class prescribed by the court.

(4) No member or associated person shall be deemed to have waived any of its right under this Code or under any

agreement to arbitrate to which it is party except to the extent stated in this paragraph.
[Amended effective October 28, 1992.]

• • • Selected NASD *Notices to Members*

84-51

Approval by the SEC of amendment to the Association's Code of Arbitration Procedures to conform to recent amendments of the Uniform Arbitration Code.

(September 28, 1984)

Simplified Arbitration

Sec. 13. (a) Any dispute, claim, or controversy arising between a public customer(s) and an associated person or a member subject to arbitration under this Code involving a dollar amount not exceeding $10,000, exclusive of attendant costs and interest, shall be arbitrated as hereinafter provided.

(b) The Claimant shall file with the Director of Arbitration an executed Submission Agreement and a copy of the Statement of Claim of the controversy in dispute and the required deposit, together with documents in support of the Claim. Sufficient additional copies of the Submission Agreement and the Statement of Claim and supporting documents shall be provided to the Director of Arbitration for each party and the arbitrator. The Statement of Claim shall specify the relevant facts, the remedies sought, and whether a hearing is demanded.

(c) The Claimant shall pay a nonrefundable filing fee and shall remit a hearing session deposit as specified in Section 43 of this Code upon filing of the Submission Agreement. The final disposition of the fee or deposit shall be determined by the arbitrator.

(d) The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the

Statement of Claim. Within twenty (20) calendar days from receipt of the Statement of Claim, Respondent(s) shall serve each party with an executed Submission Agreement and a copy of Respondent's Answer. Respondent's executed Submission Agreement and Answer shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s) along with any deposit required under the schedule of fees for customer disputes. The Answer shall designate all available defenses to the Claim and may set forth any related Counterclaim and/or related Third-Party Claim the Respondent(s) may have against the Claimant or any other person. If the Respondent(s) has interposed a Third-Party Claim, the Respondent(s) shall serve the Third-Party Respondent with an executed Submission Agreement, a copy of the Respondent's Answer containing the Third-Party Claim, and a copy of the original Claim filed by the Claimant. The Third-Party Respondent shall respond in the manner herein provided for response to the Claim. If the Respondent(s) files a related Counterclaim or Third-Party Claim exceeding $10,000, the matter may be referred to one or more arbitrators in accordance with Section 19 of this Code or the arbitrator may dismiss the Counterclaim and/or Third-Party Claim without prejudice to the Counterclaimant(s) and/or Third-Party Claimant(s) pursuing the Counterclaim and/or Third-Party Claim in a separate proceeding. The costs to the Claimant under either proceeding shall in no event exceed the total amount specified in Section 43.

(e) All parties shall serve on all other parties and the Director of Arbitration, with sufficient additional copies for the arbitrator(s), a copy of the Answer, Counterclaim, Third-Party Claim, Amended Claim, or other responsive pleading, if any. The Claimant, if a Counterclaim is asserted against him, shall within ten (10) calendar days either (i) serve on each party and on the Director of Arbitration, with sufficient additional copies for the arbitrator(s), a Reply to any Counterclaim or, (ii) if the

amount of the Counterclaim exceeds the Claim, shall have the right to file a statement withdrawing the Claim. If the Claimant withdraws the Claim, the proceedings shall be discontinued without prejudice to the rights of the parties.

(f) The dispute, claim, or controversy shall be submitted to a single public arbitrator knowledgeable in the securities industry selected by the Director of Arbitration. Unless the public customer demands or consents to a hearing, or the arbitrator calls a hearing, the arbitrator shall decide the dispute, claim, or controversy solely upon the pleadings and evidence filed by the parties. If a hearing is necessary, such hearing shall be held as soon as practicable at a locale selected by the Director of Arbitration.

[Amended effective September 8, 1992.]

(g) The Director of Arbitration may grant extensions of time to file any pleading upon a showing of good cause.

(h) (i) The arbitrator shall be authorized to require the submission of further documentary evidence as he, in his sole discretion, deems advisable.

(ii) If a hearing is demanded or consented to in accordance with Section 13(f), the General Provisions Governing Pre-Hearing Proceedings under Section 32 shall apply.

(iii) If no hearing is demanded or consented to, all requests for document production shall be submitted in writing to the Director of Arbitration within ten (10) business days of notification of the identity of the arbitrator selected to decide the case. The requesting party shall serve simultaneously its request for document production on all parties. Any response or objections to the requested document production shall be served on all parties and filed with the Director of Arbitration within five (5) business days of receipt of the requests for production. The selected arbitrator shall resolve all requests under this section on the papers submitted.

(i) Upon the request of the arbitrator, the Director of Arbitration shall appoint two (2) additional arbitrators to the panel which shall decide the matter in controversy.

(j) In any case where there is more than one (1) arbitrator, the majority shall be public arbitrators.

(k) In his discretion, the arbitrator may, at the request of any party, permit such party to submit additional documentation relating to the pleadings.

(l) Except as otherwise provided herein, the general arbitration rules of the Association shall be applicable to proceedings instituted under this Section.

[Amended effective October 1, 1984; April 1, 1988; May 10, 1989; June 18, 1990; April 26, 1991; February 2, 1992; February 13, 1992.]

• • • Interpretation of the Board of Governors

Related Counterclaim

As used in this Section 13, the term "related Counterclaim" shall mean any Counterclaim related to a customer's accounts with a member.

Hearing Requirements-Waiver of Hearing

Sec. 14. (a) Any dispute, claim, or controversy, except as provided in Section 10 (Simplified Industry Arbitration) or Section 13 (Simplified Arbitration), shall require a hearing unless all parties waive such hearing in writing and request that the matter be resolved solely upon the pleadings and documentary evidence.

(b) Notwithstanding a written waiver of a hearing by the parties, a majority of the arbitrators may call for and conduct a hearing. In addition, any arbitrator may request the submission of further evidence.

Time Limitation on Submission

Sec. 15. No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.
[Amended effective October 1, 1984.]

Dismissal of Proceedings

Sec. 16. At any time during the course of an arbitration, the arbitrators may either upon their own initiative or at the request of a party dismiss the proceeding and refer the parties to the remedies provided by applicable law. The arbitrators shall at the joint request of all the parties dismiss the proceedings.

Settlements

Sec. 17. All settlements upon any matter shall be at the election of the parties.

Tolling of Time Limitation(s) for the Institution of Legal Proceedings and Extension of Time Limitation(s) for Submission to Arbitration

Sec. 18. (a) Where permitted by applicable law, the time limitations which would otherwise run or accrue for the institution of legal proceedings shall be tolled where a duly executed Submission Agreement is filed by the Claimant(s). The tolling shall continue for such period as the Association shall retain jurisdiction upon the matter submitted.

(b) The six (6) year time limitation upon submission to arbitration shall not apply when the parties have submitted the dispute, claim, or controversy to a court of competent jurisdiction. The six (6) year time limitation shall not run for such

period as the court shall retain jurisdiction upon the matter submitted.
[Amended effective October 1, 1984.]

Designation of Number of Arbitrators

Sec. 19. (a) Except as otherwise provided in Section 13 of the Code, in all arbitration matters involving public customers and where the amount in controversy does not exceed $30,000, the Director of Arbitration shall appoint a single public arbitrator knowledgeable in but who is not from the securities industry to decide the dispute, claim, or controversy. Upon the request of a party in its initial filing or the arbitrator, the Director of Arbitration shall appoint a panel of three (3) arbitrators which shall decide the matter in controversy. At least a majority of the arbitrators appointed shall not be from the securities industry, unless the public customer requests a panel consisting of at least a majority from the securities industry.

(b) In arbitration matters involving public customers and where the amount in controversy exceeds $30,000, or where the matter in controversy does not involve or disclose a money claim, the Director of Arbitration shall appoint an arbitration panel which consists of no fewer than three (3) nor more than five (5) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer requests a panel consisting of at least a majority from the securities industry.

(c) An arbitrator will be deemed as being from the securities industry if he or she:

(1) is a person associated with a member or other broker/dealer, municipal securities dealer, government securities broker, or government securities dealer, or

(2) has been associated with any of the above within the past three (3) years, or

(3) is retired from any of the above, or

(4) is an attorney, accountant, or other professional who has devoted twenty (20) percent or more of his or her professional work effort to securities industry clients within the last two years.

(5) is an individual who is registered under the Commodity Exchange Act or is a member of a registered futures association or any commodities exchange or is associated with any such person(s).

(d) An arbitrator who is not from the securities industry shall be deemed a public arbitrator. A person will not be classified as a public arbitrator if he or she has a spouse or other member of the household who is a person who is associated with a member or other broker/dealer, municipal securities dealer, government securities broker, or government securities dealer.

[Amended effective July 1, 1986; April 1, 1988; May 10, 1989.]

Composition of Panels

Sec. 20. The individuals who shall serve on a particular arbitration panel shall be determined by the Director of Arbitration. The Director of Arbitration may name the chairman of the panel.

Notice of Selection of Arbitrators

Sec. 21. The Director of Arbitration shall inform the parties of the arbitrators' names and employment histories for the past ten (10) years, as well as information disclosed pursuant to Section 23, at least eight (8) business days prior to the date fixed for the first hearing session. A party may make further inquiry of the Director of Arbitration concerning an arbitrator's background. In the event that prior to the first hearing session, any arbitrator should become disqualified, resign, die, refuse or otherwise be unable to perform as an arbitrator, the Director of Arbitration shall appoint a

replacement arbitrator to fill the vacancy on the panel. The Director of Arbitration shall inform the parties as soon as possible of the name and employment history of the replacement arbitrator for the past ten (10) years, as well as information disclosed pursuant to Section 23. A party may make further inquiry of the Director of Arbitration concerning the replacement arbitrator's background and, within the time remaining prior to the first hearing session or the five (5) day period provided under Section 22, whichever is shorter, may exercise its right to challenge the replacement arbitrator as provided in Section 22.
[Amended effective September 19, 1988; May 10, 1989.]

Peremptory Challenge

Sec. 22. In any arbitration proceeding, each party shall have the right to one (1) peremptory challenge. In arbitrations where there are multiple Claimants, Respondents, and/or Third-Party Respondents, the Claimants shall have one (1) peremptory challenge, the Respondents shall have one (1) peremptory challenge, and the Third-Party Respondents shall have one (1) peremptory challenge, unless the Director of Arbitration determines that the interests of justice would be best served by awarding additional peremptory challenges. Unless extended by the Director of Arbitration, a party wishing to exercise a peremptory challenge must do so by notifying the Director of Arbitration in writing within five (5) business days of notification of the identity of the person(s) named under Section 21 or Section 32(d) or (e), whichever comes first. There shall be unlimited challenges for cause.
[Amended effective October 1, 1984; February 22, 1992.]

Disclosures Required of Arbitrators

Sec. 23. (a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might

preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose:

(1) Any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) Any existing or past financial, business, professional, family, or social relationships that are likely to affect impartiality or might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships that they personally have with any party or its counsel, or with any individual whom they have been told will be a witness. They should also disclose any such relationship involving members of their families or their current employers, partners, or business associates.

(b) Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in Paragraph (a) above.

(c) The obligation to disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination described in subsection (a) hereof is a continuing duty that requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests, relationships, or circumstances that arise, or are recalled or discovered.

(d) Prior to the commencement of the first hearing session, the Director of Arbitration may remove an arbitrator based on information disclosed pursuant to this Section. The Director of Arbitration shall also inform the parties of any information disclosed pursuant to this Section if the arbitrator who disclosed the information is not removed.

[Amended effective May 10, 1989.]

Disqualification or Other Disability of Arbitrators

Sec. 24. In the event that any arbitrator, after the commencement of the first hearing session but prior to the rendi-

tion of the award, should become disqualified, resign, die, refuse, or otherwise be unable to perform as an arbitrator, the remaining arbitrator(s) shall continue with the hearing and determination of the controversy, unless such continuation is objected to by any party within five (5) days of notification of the vacancy on the panel. Upon objection, the Director of Arbitration shall appoint a replacement arbitrator to fill the vacancy and the hearing shall continue. The Director of Arbitration shall inform the parties as soon as possible of the name and employment history of the replacement arbitrator for the past ten (10) years, as well as information disclosed pursuant to Section 23. A party may make further inquiry of the Director of Arbitration concerning the replacement arbitrator's background and within the time remaining prior to the next scheduled hearing session or the five (5) day period provided under Section 22, whichever is shorter, may exercise its right to challenge the replacement arbitrator as provided in Section 22.

[Amended effective September 19, 1988.]

Initiation of Proceedings

Sec. 25. Except as otherwise provided herein, an arbitration proceeding under this Code shall be instituted as follows:

Statement of Claim

(a) The Claimant shall file with the Director of Arbitration an executed Submission Agreement, a Statement of Claim of the controversy in dispute, together with the documents in support of the Claim, and the required deposit. Sufficient additional copies of the Submission Agreement and the Statement of Claim and supporting documents shall be provided to the Director of Arbitration for each party and each arbitrator. The Statement of Claim shall specify the relevant facts and the remedies sought. The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s)

one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim.

Answer-Defenses, Counterclaims, And/or Cross-Claims

(b)(1) Within twenty (20) business days from receipt of the Statement of Claim, the Respondent(s) shall serve each party with an executed Submission Agreement and a copy of the Respondent's Answer. The Respondent's executed Submission Agreement and Answer shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrators along with any deposit required under the schedule of fees. The Answer shall specify all available defenses and relevant facts thereto that will be relied upon at the hearing and may set forth any related Counterclaim the Respondent(s) may have against the Claimant, any Cross-Claim the Respondent(s) may have against any other named Respondent(s), and any Third-Party Claim against any other party or person based upon any existing dispute, claim, or controversy subject to arbitration under this Code.

(2)(i) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent, or Third-Party Respondent who pleads only a general denial as an Answer may, upon objection by a party, in the discretion of the arbitrators, be barred from presenting any facts or defenses at the time of the hearing.

(ii) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent, or Third-Party Respondent who fails to specify all available defenses and relevant facts in such party's Answer may, upon objection by a party, in the discretion of the arbitrators, be barred from presenting such facts or defenses not included in such party's Answer at the hearing.

(iii) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent, or Third-Party Respondent who fails to file an Answer within twenty (20) business days from receipt of service of a Claim, unless the time to answer has been

extended pursuant to paragraph (5), below, may, in the discretion of the arbitrators, be barred from presenting any matter, arguments, or defenses at the hearing.

(3) Respondent(s) shall serve each party with a copy of any Third-Party Claim. The Third-Party Claim shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s) along with any deposit required under the schedule of fees. Third-Party Respondent(s) shall answer in the manner provided for response to the Claim, as provided in paragraphs (1) and (2) above.

(4) The Claimant shall serve each party with a Reply to a Counterclaim within ten (10) days of receipt of an Answer containing a Counterclaim. The Reply shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s).

(5) The time period to file any pleading, whether such be denominated as a Claim, Answer, Counterclaim, Cross-Claim, Reply, or Third-Party Pleading, may be extended for such further period as may be granted by the Director of Arbitration.

Service and Filing With the Director Of Arbitration

(c)(1) Service may be effected by mail or other means of delivery. Service and filing are accomplished on the date of mailing either by first-class postage prepaid or by means of overnight mail service or, in the case of other means of service, on the date of delivery. Filing with the Director of Arbitration shall be made on the same date as service on a party.

(2) If a member firm and a person associated with the member firm are named parties to an arbitration proceeding at the time of the filing of the Statement of Claim, service on the person associated with the member firm may be made on the associated person or the member firm, which shall perfect service upon the associated person. If the member firm does not undertake to represent the associated person, the member

firm shall serve the associated person with the Statement of Claim, shall advise all parties and the Director of Arbitration of that fact, and shall provide such associated person's current address.

Joinder and Consolidation — Multiple Parties

(d)(1) Permissive Joinder. All persons may join in one (1) action as claimants if they assert any right to relief jointly, severally, or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any questions of law or fact common to all these claimants will arise in the action. All persons may be joined in one action as respondents if there is asserted against them, jointly or severally, any right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences and if any questions of law or fact common to all respondents will arise in the action.

A claimant or respondent need not assert rights to or defend against all the relief demanded. Judgment may be given for one or more of the claimants according to their respective rights to relief, and against one or more respondents according to their respective liabilities.

(2) In arbitrations where there are multiple Claimants, Respondents, and/or Third-Party Respondent, the Director of Arbitration shall be authorized to determine preliminarily whether such parties should proceed in the same or separate arbitrations. Such determination will be considered subsequent to the filing of all responsive pleadings.

(3) The Director of Arbitration shall be authorized to determine preliminarily whether claims filed separately are related and shall be authorized to consolidate such claims for hearing and award purposes.

(4) Further determinations with respect to joinder, consolidation, and multiple parties under this subsection shall be made by the arbitration panel and shall be deemed final. [Amended effective October 1, 1984; July 1, 1986; May 10, 1989; May 7, 1991.]

Designation of Time and Place of Hearing

Sec. 26. The time and place of the initial hearing shall be determined by the Director of Arbitration and each hearing thereafter by the arbitrators. Notice of the time and place for the initial hearing shall be given at least eight (8) business days prior to the day fixed for the hearing by personal service, registered, or certified mail to each of the parties unless the parties shall, by their mutual consent, waive the notice provisions under this Section. Notice for each hearing thereafter shall be given as the arbitrators may determine. Attendance at a hearing waives notice thereof.
[Amended effective May 7, 1991.]

Representation by Counsel

Sec. 27. All parties shall have the right to representation by counsel at any stage of the proceedings.

Attendance at Hearings

Sec. 28. The attendance or presence of all persons at hearings including witnesses shall be determined by the arbitrators. However, all parties to the arbitration and their counsel shall be entitled to attend all hearings.

Failure to Appear

Sec. 29. If any of the parties, after due notice, fails to appear at a hearing or at any continuation of a hearing session, the arbitrators may, in their discretion, proceed with the arbitration of the controversy. In such cases, all awards shall be

rendered as if each party had entered an appearance in the matter submitted.
[Amended effective February 2, 1992.]

Adjournments

Sec. 30. (a) The arbitrator(s) may, in their discretion, adjourn any hearing(s) either upon their own initiative or upon the request of any party to the arbitration.

(b) Unless waived by the Director of Arbitration upon a showing of financial need, a party requesting an adjournment after arbitrators have been appointed shall deposit with the request for an adjournment, a fee equal to the initial deposit of hearing session fees for the first adjournment and twice the initial deposit of hearing session fees, not to exceed $1,000, for a second or subsequent adjournment requested by that party. If the adjournment is not granted, the deposit shall be refunded. If the adjournment is granted, the arbitrator(s) may direct the return of the adjournment fee.

(c) Upon receiving a third request consented to by all parties for an adjournment, the arbitrator(s) may dismiss the arbitration without prejudice to the Claimant filing a new arbitration.
[Amended effective June 18, 1990; December 20, 1991.]

Acknowledgement of Pleadings

Sec. 31. The arbitrators shall acknowledge to all parties present that they have read the pleadings filed by the parties.

General Provisions Governing Pre-Hearing Proceedings

Sec. 32. (a) Requests for Documents And Information.

The parties shall cooperate to the fullest extent practicable in the voluntary exchange of documents and information to expedite the arbitration. Any request for documents or other information should be specific, relate to the matter in controversy, and afford the party to whom the request is made a

reasonable period of time to respond without interfering with the time set for the hearing.

(b) Document Production and Information Exchange.

(1) Any party may serve a written request for information or documents ("information request") upon another party twenty (20) business days or more after service of the Statement of Claim by the Director of Arbitration or upon filing of the Answer, whichever is earlier. The requesting party shall serve the information request on all parties and file a copy with the Director of Arbitration. The parties shall endeavor to resolve disputes regarding an information request prior to serving any objection to the request. Such efforts shall be set forth in the objection.

(2) Unless a greater time is allowed by the requesting party, information requests shall be satisfied or objected to within thirty (30) calendar days from the date of service. Any objection to an information request shall be served by the objecting party on all parties and filed with the Director of Arbitration.

(3) Any response to objections to an information request shall be served on all parties and filed with the Director of Arbitration within ten (10) calendar days of receipt of the objection.

(4) Upon the written request of a party whose information request is unsatisfied, the matter will be referred by the Director of Arbitration to either a prehearing conference under subsection (d) of this section or to a selected arbitrator under subsection (e) of this section.

(c) PreHearing Exchange.

At least ten (10) calendar days prior to the first scheduled hearing date, all parties shall serve on each other copies of documents in their possession they intend to present at the hearing and shall identify witnesses they intend to present at the hearing. The arbitrators may exclude from the arbitration any documents not exchanged or witnesses not identified.

This paragraph does not require service of copies of documents or identification of witnesses which parties may use for cross-examination or rebuttal.

(d) Pre-Hearing Conference.

(1) Upon the written request of a party, an arbitrator, or at the discretion of the Director of Arbitration, a pre-hearing conference shall be scheduled. The Director of Arbitration shall set the time and place of a pre-hearing conference and appoint a person to preside. The pre-hearing conference may be held by telephone conference call. The presiding person shall seek to achieve agreement among the parties on any issue which relates to the pre-hearing process or to the hearing, including but not limited to exchange of information, exchange or production of documents, identification of witnesses, identification and exchange of hearing documents, stipulation of facts, identification and briefing of contested issues, and any other matters which will expedite the arbitration proceedings.

(2) Any issues raised at the pre-hearing conference that are not resolved may be referred to a single member of the arbitration panel for decision.

(e) Decisions by Selected Arbitrator.

The Director of Arbitration may appoint a single member of the arbitration panel to decide all unresolved issues under this Section. In matters involving public customers, such single arbitrator shall be a public arbitrator, except that the arbitrator may be either public or industry when the public customer has requested a panel consisting of a majority from the securities industry. Such arbitrator shall be authorized to act on behalf of the panel to issue subpoenas, direct appearances of witnesses and production of documents, set deadlines for compliance, and issue any other ruling which will expedite the arbitration proceedings. Decisions under this section shall be made upon the papers submitted by the parties, unless the arbitrator calls a hearing. The arbitrator may elect to refer any issue under this section to the full panel.

[Amended effective May 10, 1989.]

Subpoenas and Power to Direct Appearances

Sec. 33. (a) Subpoenas. The arbitrators and any counsel of record to the proceeding shall have the power of the subpoena process as provided by law. All parties shall be given a copy of a subpoena upon its issuance. Parties shall produce witnesses and present proofs to the fullest extent possible without resort to the subpoena process.

(b) Power to Direct Appearances and Production of Documents. The arbitrators shall be empowered without resort to the subpoena process to direct the appearance of any person employed or associated with any member of the Association and/or the production of any records in the possession or control of such persons or members. Unless the arbitrators direct otherwise, the party requesting the appearance of a person or the production of documents under this Section shall bear all reasonable costs of such appearance and/or production.

[Amended effective May 10, 1989.]

Evidence

Sec. 34. The arbitrators shall determine the materiality and relevance of any evidence proffered and shall not be bound by rules governing the admissibility of evidence.

Interpretation of Provisions of Code and Enforcement of Arbitrator(s) Rulings

Sec. 35. The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrators. Such interpretations and actions to obtain compliance shall be final and binding upon the parties.

[Amended November 16, 1992.]

Determination of Arbitrators

Sec. 36. All rulings and determinations of the panel shall be by a majority of the arbitrators.

Record of Proceedings

Sec. 37. A verbatim record by stenographic reporter or a tape recording of all arbitration hearings shall be kept. If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request unless the arbitrators direct otherwise. The arbitrators may also direct that the record be transcribed. If the record is transcribed at the request of any party, a copy shall be provided to the arbitrators.
[Amended effective May 10, 1989.]

Oaths of the Arbitrators and Witnesses

Sec. 38. Prior to the commencement of the first session, an oath or affirmation shall be administered to the arbitrators. All testimony shall be under oath or affirmation.

Amendments

Sec. 39. (a) After the filing of any pleadings, if a party desires to file a new or different pleading, such change must be made in writing and filed with the Director of Arbitration with sufficient additional copies for each arbitrator. The party filing a new or different pleading shall serve on all other parties a copy of the new or different pleading in accordance with the provisions set forth in Section 25(b). The other parties may, within ten (10) business days from the receipt of service, file a response with all other parties and the Director of Arbitration in accordance with Section 25(b).

(b) After a panel has been appointed, no new or different pleading may be filed except for a responsive pleading as provided for in (a) above or with the panel's consent. [Amended effective October 1, 1984; April 26, 1991.]

• • • Policy Concerning Closing Arguments

In response to recent questions concerning the order of closing argument in arbitration proceedings conducted under the auspices of the National Association of Securities Dealers, Inc., it is the practice in these proceedings to allow claimants to proceed first in closing argument, with rebuttal argument being permitted. Claimants may reserve their entire closing for rebuttal. The hearing procedures may, however, be varied in the discretion of the arbitrators, provided all parties are allowed a full and fair opportunity to present their respective cases.

(October 26, 1990)

Reopening of Hearings

Sec. 40. Where permitted by applicable law, the hearings may be reopened by the arbitrators on their own motion or at the discretion of the arbitrators upon application of a party at any time before the award is rendered.

Awards

Sec. 41. (a) All awards shall be in writing and signed by a majority of the arbitrators or in such manner as is required by applicable law. Such awards may be entered as a judgment in any court of competent jurisdiction.

(b) Unless the applicable law directs otherwise, all awards rendered pursuant to this Code shall be deemed final and not subject to review or appeal.

(c) The Director of Arbitration shall endeavor to serve a copy of the award: (i) by registered or certified mail upon all

parties, or their counsel, at the address of record; or, (ii) by personally serving the award upon the parties; or, (iii) by filing or delivering the award in such manner as may be authorized by law.

(d) The arbitrator(s) shall endeavor to render an award within thirty (30) business days from the date the record is closed.

(e) The award shall contain the names of the parties, the name of counsel, if any, a summary of the issues, including the type(s) of any security or product, in controversy, the damages and other relief requested, the damages and other relief awarded, a statement of any other issues resolved, the names of the arbitrators, the dates the claim was filed and the award rendered, the number and dates of hearing sessions, the location of the hearings, and the signatures of the arbitrators concurring in the award.

(f) All awards involving public customers and their contents, excluding the names of the arbitrators, shall be made publicly available. A party to an arbitration involving a public customer may request that the Director of Arbitration provide copies of all awards rendered by the arbitrator(s) chosen to decide its case. A party wishing to obtain such information must notify the Director of Arbitration within three (3) business days of receipt of notification of the identity of the person(s) named to the panel.

(g) Fees and assessments imposed by the arbitrators under Sections 43 and 44 shall be paid immediately upon the receipt of the award by the parties. Payment of such fees shall not be deemed ratification of the award by the parties.

(h) All monetary awards shall be paid within thirty (30) days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. An award shall bear interest from the date of the award: (i) if not paid within thirty (30) days of receipt, (ii) if the award is the subject of a motion to vacate which is denied, or (iii) as specified by the arbitrator(s)

in the award. Interest shall be assessed at the legal rate, if any, then prevailing in the state where the award was rendered, or at a rate set by the arbitrator(s).
[Amended effective May 10, 1989; April 26, 1991; May 7, 1991; February 2, 1992.]

Miscellaneous

Sec. 42. This Code shall be deemed a part of and incorporated by reference in every agreement to arbitrate under the rules of the National Association of Securities Dealers, Inc. including a duly executed Submission Agreement.
[Amended effective May 7, 1991.]

Schedule of Fees for Customer Disputes

Sec. 43. (a) At the time of filing a Claim, Counterclaim, Third-Party Claim, or Cross-Claim, a party shall pay a nonrefundable filing fee and shall remit a hearing session deposit to the Association in the amounts indicated in the schedules below unless such fee or deposit is specifically waived by the Director of Arbitration.

Where multiple hearing sessions are required, the arbitrators may require any of the parties to make additional hearing deposits for each additional hearing session. In no event shall the amount deposited by all parties per hearing session exceed the amount of the largest initial hearing deposit made by any party under the schedule of fees.

(b) A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less. The forum fee for a pre-hearing conference with an arbitrator shall be the amount set forth in the schedules below as a hearing session deposit for a hearing with a single arbitrator.

(c) The arbitrators, in their awards, shall determine the amount chargeable to the parties as forum fees and shall

determine who shall pay such forum fees. Forum fees chargeable to the parties shall be assessed on a per hearing session basis, and the aggregate for each hearing session may equal but shall not exceed the amount of the largest initial hearing deposit deposited by any party, except in a case where claims have been joined subsequent to filing in which case hearing session fees shall be computed as provided in paragraph (d). The arbitrators may determine in the award that a party shall reimburse to another party any nonrefundable filing fee it has paid. If a customer is assessed forum fees in connection with an industry claim, forum fees assessed against the customer shall be based on the hearing deposit required under the industry claims schedule for the amount awarded to industry parties to be paid by the customer and not based on the size of the industry claim. No fees shall be assessed against a customer in connection with an industry claim that is dismissed; however, in cases where there is also a customer claim, the customer may be assessed forum fees based on the customer claim under the procedure set out above. Amounts deposited by a party shall be applied against forum fees, if any. In addition to forum fees, the arbitrator(s) may determine in the award the amount of costs incurred pursuant to Sections 30, 32, 33, and 37 and, unless applicable law directs otherwise, other costs and expenses of the parties and arbitrators which are within the scope of the agreement of the parties. The arbitrator(s) shall determine by whom such costs shall be borne. If the hearing session fees are not assessed against a party who had made a hearing deposit, the hearing deposit will be refunded unless the arbitrators determine otherwise.

(d) For claims filed separately which are subsequently joined or consolidated under Section 25(d) of this Code, the hearing deposit and forum fees assessable per hearing session after joinder or consolidation shall be based on the cumulative amount in dispute. The arbitrator(s) shall determine by whom such fees shall be borne.

(e) If the dispute, claim, or controversy does not involve, disclose, or specify a money claim, the nonrefundable filing fee shall be $250 and the hearing session deposit to be remitted by a party shall be $600 or such greater or lesser amount as the Director of Arbitration or the panel of arbitrators may require, but shall not exceed $1,000.

(f) The Association shall retain the total initial amount deposited as hearing session deposits by all the parties in any matter submitted and settled or withdrawn within eight (8) business days of the first scheduled hearing session other than a pre-hearing conference.

(g) Any matter submitted and thereafter settled or withdrawn subsequent to the commencement of the first hearing session. including a pre-hearing conference with an arbitrator, shall be subject to an assessment of forum fees and costs incurred pursuant to Sections 30, 32, 33, and 37 based on hearing sessions held and scheduled within eight (8) business days after the Association receives notice that the matter has been settled or withdrawn. The arbitrator(s) shall determine by whom such forum fees and costs shall be borne.

Schedule of Fees

For purposes of the schedule of fees, the term "claim" includes Claims, Counterclaims, Third-Party Claims, and Cross-Claims. Any such claim made by a customer is a customer claim. Any such claim made by a member or associated person of a member is an industry claim.

Amount in Dispute (Exclusive of Interest and Expenses)	Customer Claimant Claim Filing Fee		Hearing Session Deposit	
		Simp.[1]	1 Arb.[2]	3+ Arbs.[3]
$.01-$1,000	$15	$15	$15	NA
$1,000.01-$2,500	$25	$25	$25	NA
$2,500.01-$5,000	$50	$75	$100	NA
$5,000.01-$10,000	$75	$75	$200	NA
$10,000.01-$30,000	$100	NA	$300	$400
$30,000.01-$50,000	$120	NA	$300[4]	$400
$50,000.01-$100,000	$150	NA	$300[4]	$500
$100,000.01-$500,000	$200	NA	$300[4]	$750
$500,000.01-$5,000,000	$250	NA	$300[4]	$1,000
Over $5,000,000	$300	NA	$300[4]	$1,500

Amount in Dispute (Exclusive of Interest and Expenses)	Industry Claimant Claim Filing Fee		Hearing Session Deposit	
$.01-$1,000	$500	$75	$300	NA
$1,000.01-$2,500	$500	$75	$300	NA
$2,500.01-$5,000	$500	$75	$300	NA
$5,000.01-$10,000	$500	$75	$300	NA
$10,000.01-$30,000	$500	NA	$300	$600
$30,000.01-$50,000	$500	NA	$300	$600
$50,000.01-$100,000	$500	NA	$300[4]	$600
$100,000.01-$500,000	$500	NA	$300[4]	$750
$500,000.01-$5,000,000	$500	NA	$300[4]	$1,000
Over $5,000,000	$500	NA	$300[4]	$1,500

[1]Simplified Arbitration (Without Hearing)
[2]One Arbitrator (Per Hearing Session)
[3]Three or More Arbitrators (Per Hearing Session)
[4]Pre-hearing Conferences Only

[Amended effective October 1, 1984; July 1, 1987; April 1, 1988; May 10, 1989; June 18, 1990.]

Schedule of Fees for Industry and Clearing Controversies

Sec. 44. (a) At the time of filing a Claim, Counterclaim, Third-Party Claim, or Cross-Claim in an industry or clearing controversy that is required to be submitted to arbitration before the Association as set forth in Section 8, above, a party shall pay a nonrefundable filing fee and shall remit a hearing session deposit to the Association in the amounts indicated in the schedule below unless such fee or deposit is specifically waived by the Director of Arbitration.

Where multiple hearing sessions are required, the arbitrator(s) may require any of the parties to make additional hearing deposits for each additional hearing session. In no event shall the amount deposited by all parties per hearing session exceed the amount of the largest initial hearing deposit made by any party under the schedule below.

(b) A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less. The forum fee for a pre-hearing conference with an arbitrator shall be the amount set forth in the schedule below as a hearing session deposit for a hearing with a single arbitrator.

(c) The arbitrators, in their award, shall determine the amount chargeable to the parties as forum fees and shall determine who shall pay such forum fees. Forum fees chargeable to the parties shall be assessed on a per hearing session basis, and the aggregate for each hearing session may equal but shall not exceed the amount of the largest initial hearing deposit deposited by any party, except in a case where claims have been joined subsequent to filing in which case hearing session fees shall be computed as provided in paragraph (d). The arbitrator(s) may determine in the award that a party shall reimburse to another party any non-refundable filing fee has paid. Amounts deposited by a party shall be applied against forum fees, if any. In addition to forum fees, the arbitrators may determine in the award the amount of costs incurred

pursuant to Sections 30, 32, 33, and 337 and, unless applicable law directs otherwise, other costs and expenses of the parties and arbitrators which are within the scope of the agreement of the parties. The arbitrator(s) shall determine by whom such costs shall be borne. If the hearing session fees are not assessed against a party who had made a hearing deposit, the hearing deposit will be refunded unless the arbitrators determine otherwise.

(d) For claims filed separately which are subsequently joined or consolidated under Section 25(d) of this Code, the hearing deposit and forum fees assessable per hearing session after joinder or consolidation shall be based on the cumulative amount in dispute. The arbitrator(s) shall determine by whom such fees shall be borne.

(e) If the dispute, claim, or controversy does not involve, disclose, or specify a money claim the non-refundable filing fee will be $250 and the hearing session deposit to be deposited by a party shall be $600, or such greater or lesser amount as the Director of Arbitration or the panel of arbitrators may require, but shall not exceed $1,000.

(f) The Association shall retain the total initial amount deposited as hearing session deposits by all the parties in any matter submitted and settled or withdrawn within eight business days of the first scheduled hearing session other than a pre-hearing conference.

(g) Any matter submitted and thereafter settled or withdrawn subsequent to the commencement of the first hearing session, including a pre-hearing conference with an arbitrator, shall be subject to an assessment of forum fees and costs incurred pursuant to Sections 30, 32, 33, and 37 based on hearing sessions held and scheduled within eight (8) business days after the Association receives notice that the matter has been settled or withdrawn. The arbitrator(s) shall determine by whom such fees and costs shall be borne.

(h) In each industry or clearing controversy which is required to be submitted to arbitration before the Association as set forth in Section 8, above, requiring expedited hearings, a non-refundable surcharge of $2,500 shall be paid by all Claimants, collectively, and a nonrefundable surcharge of $2,500 shall be paid by all Respondents, collectively. These surcharge fees shall be in addition to all other non-refundable filing fees, hearing deposits, or costs which may be required.

Amount in Dispute (Exclusive of Interest and Expenses)	Customer Claimant Claim Filing Fee	Hearing Session Deposit		
		Simp.[1]	1 Arb.[2]	3+ Arbs.[3]
$.01-$1,000	$500	$75	$300	NA
$1,000.01-$2,500	$500	$75	$300	NA
$2,500.01-$5,000	$500	$75	$300	NA
$5,000.01-$10,000	$500	$75	$300	NA
$10,000.01-$30,000	$500	NA	$300	$600
$30,000.01-$50,000	$500	NA	$300[4]	$600
$50,000.01-$100,000	$500	NA	$300[4]	$600
$100,000.01-$500,000	$500	NA	$300[4]	$750
$500,000.01-$5,000,000	$500	NA	$300[4]	$1,000
Over $5,000,000	$500	NA	$300[4]	$1,500

[1]Simplified Arbitration (Without Hearing)
[2]One Arbitrator (Per Hearing Session)
[3]Three or More Arbitrators (Per Hearing Session)
[4]Pre-hearing Conferences Only

[Section added effective May 10, 1989; amended June 18, 1990.]

• • •Resolution of the Board of Governors

¶ 3744 Failure to Act Under Provisions of Code of Arbitration Procedure

It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Article III, Section 1 of the Rules of Fair Practice for a member or a

person associated with a member to fail to submit a dispute for arbitration under the NASD Code of Arbitration Procedure as required by that Code, to fail to appear or to produce any document in his possession or control as directed pursuant to provisions of the NASD Code of Arbitration Procedure, or to fail to honor an award of arbitrators property rendered pursuant to the Uniform Code of Arbitration under the auspices of the National Association of Securities Dealers, Inc., the New York, American, Boston, Cincinnati, Midwest, Pacific, or Philadelphia Stock Exchanges, the Chicago Board Options Exchange, the Municipal Securities Rulemaking Board, or pursuant to the rules applicable to the arbitration of securities disputes before the American Arbitration Association, where a timely motion has not been made to vacate or modify such award pursuant to applicable law.

All awards shall be honored by a cash payment to the prevailing party of the exact dollar amount stated in the award. Awards may not be honored by crediting the prevailing party's account with the dollar amount of the award, unless authorized by the express terms of the award or consented to in writing by the parties. Awards shall be honored upon receipt thereof, or within such other time period as may be prescribed by the award.

Action by members requiring associated persons to waive the arbitration of disputes contrary to the provisions of the Code of Arbitration Procedure shall constitute conduct that is inconsistent with just and equitable principles of trade and a violation of Article III, Section 1 of the Rules of Fair Practice.

(Resolution adopted effective May 1, 1973; amended effective July 1, 1987; amended effective May 7, 1991.)

• • • Selected *NASD Notice to Members 87-55*

Amendment to NASD Code of Arbitration Procedure and Resolution of the Board of Governors Relating to Timely Cash Payment of Awards effective July 1, 1987.

(August 14, 1987)

• • • Selected *NASD Notice to Members*

88-14

Additional Arbitration Filing Fee for Members and Advertising Service Charge.

(February 10, 1988)

CODE OF ARBITRATION PROCEDURE

Amendments to October 1, 1993 Edition

On October 1, 1993, Section 41.(f) was amended to make all arbitration awards, their contents, and the names of arbitrators publicly available. For public customer cases, this rule change will apply to awards rendered on or after May 10, 1989. For industry cases, including employment disputes, this rule change will apply to awards rendered on or after October 1, 1993:

Awards

Sec. 41. (f) All awards and their contents shall be made publicly available.

* * *

On October 1, 1993, Sections 1 and 8 were amended to clarify that employment-related disputes are arbitrable under the Code.

PART I. ADMINISTRATIVE PROVISIONS

Matters Eligible for Submission

Sec. 1. This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII, Section 1(a)(3) of the By-Laws of the National Association of Securities Dealers, Inc., (the Association) for the arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company:

(1) between or among members;

(2) between or among members and associated persons;

(3) between or among members or associated persons and public customers, or others; and

(4) between or among members, registered clearing agencies with which the Association has entered into an agreement to utilize the Association's arbitration facilities and procedures, and participants, pledgees or other persons using the facilities of a registered clearing agency, as these terms are defined under the rules of such a registered clearing agency.

* * *

PART II. INDUSTRY AND CLEARING CONTROVERSIES

Required Submission

Sec. 8. (a) Any dispute, claim or controversy eligible for submission under Part I of this Code between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s) or in con-

nection with the activities of such associated person(s), or arising out of the employment or termination of employment of such associated person(s) by and with such member, shall be arbitrated under this Code, at the instance of:

(1) a member against another member;

(2) a member against a person associated with a member or a person associated with a member against a member; and,

(3) a person associated with a member against a person associated with a member.

* * *

On October 1, 1993, Section 9 was amended to provide that under certain circumstances employment disputes would be decided by a panel consisting of a majority of public arbitrators. This provision applies to cases where a panel has not yet been appointed as of October 1, 1993.

Composition of Panels

Sec. 9. (a) In disputes subject to arbitration that arise out of the employment or termination of employment of an associated person, and that relate exclusively to disputes involving employment contracts, promissory notes or receipt of commissions the panel of arbitrators shall be appointed as provided by Sections 9(b)(i), (b)(ii) or 10 of the Code, whichever is applicable. In all other disputes arising out of the employment or termination of employment of an associated person, the panel of arbitrators shall be appointed as provided by Sections 13 or 19 of the Code, whichever is applicable.

(b)(i) Except as other-wise provided in Section 9(a) or 10 of the Code, in all arbitration matters between or among members and/or persons associated with members, and where the amount in controversy does not exceed $30,000, the Director of Arbitration shall appoint a single arbitrator to

decide the matter in controversy. The arbitrator chosen shall be from the securities industry. Upon the request of a party in its initial filing or the arbitrator, the Director of Arbitration shall appoint a panel of three (3) arbitrators, all of whom shall be from the securities industry.

(ii) Except as otherwise provided in Section 9(a), in all arbitration matters between or among members and/or persons associated with members and where the amount in controversy exceeds $30,000, a panel shall consist of three arbitrators, all of whom shall be from the securities industry.

Exhibit D

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

Brian L. Honn,

Claimant,

v. **RESPONDENT'S WITNESS LIST**

R.J. Steichen and Company, John E. Feltl and John Does,

NASD File No. 93-02443

Respondents.

The Respondents' in the above-captioned matter may call the following individuals during their case in chief:

1. John E. Feltl
   R.J. Steichen & Company
   801 Nicollet Mall, Suite 1100
   Minneapolis, MN 55402

2. Mary Jo Feltl
   R.J. Steichen & Company
   801 Nicollet Mall, Suite 1100
   Minneapolis, MN 55402

3. Joan Niedfeldt
   R.J. Steichen & Company
   801 Nicollet Mall, Suite 1100
   Minneapolis, MN 55402

4. Steve Kloyda
R. J. Steichen & Company
801 Nicollet Mall, Suite 1100
Minneapolis, MN 55402

5. Richard Heise
R. J. Steichen & Company
801 Nicollet Mall, Suite 1100
Minneapolis, MN 55402

6. Michael B. Schierman
R. J. Steichen & Company
801 Nicollet Mall, Suite 1100
Minneapolis, MN 55402

7. Herbert Peterson
R. J. Steichen & Company
801 Nicollet Mall, Suite 1100
Minneapolis, MN 55402

8. A Representative of Piper Jaffray Companies

9. A Representative of Shearson Lehman Brothers

10. A Representative of Dean Witter Reynolds, Inc.

11. A Representative of John G. Kinnard & Co.

12. A Representative from Craig-Hallum, Inc.

Respondents reserve the right to call any witnesses in rebuttal to Claimant's case in chief and to use to impeach any testimony that Claimant provides during his case in chief.

Dated: May 19, 1994

MAUN & SIMON, PLC

s/s

Albert A. Woodward(#118801)
Steven E. Rau (#147990)
2300 World Trade Center
Saint Paul, Minnesota 55101-4904
612-229-2900

COUNSEL FOR RESPONDENTS
R. J. STEICHEN AND
COMPANY AND JOHN E.
FELTL

5/19/94, SER, 52316_1S

EXHIBIT E

Partial Transcript of June 9, 1994 Hearing in which Parties Agree that the Record has been Closed

Steven Rau (Counsel to Steichen Respondents):	I don't know if you want to do this on the record or off the record we have . . . because I'm done . . . with my witnesses.
Randall Blohm (Arbitration Chair Person):	Alright . . . you are not going to put Mr. Feltl on? . . . you're done.
Mr. Rau:	Not unless . . . would the panel like to talk with Mr. Feltl? I'd be happy to put him up there and you can ask him any questions you have . . .
Mr. Blohm:	Well it's your case . . .
Mr. Rau:	Well his testimony would be redundant of everything that we've covered today.
	. . .
Mr. Blohm:	Well let's see how much time we have and how much time counsel wants to take [for closing arguments].

Mr. Rau: My clients have indicated they would like to talk with me before I sum and I understand that one of you needs to be out of here by 5:00 is that correct?

Mr. Blohm: Correct.

Mr. Rau: I have no idea how long Ms. Bender's summation is going to be. I cannot imagine that mine would be more than one-half hour.

Janice Frankman (Arbitrator): Is there rebuttal?

Rebecca Bender (Counsel to Brian Honn): I introduced these additional documents this morning that are probably officially rebuttal, but they're in, Thanks.

Mr. Blohm: So you're ready to make your . . .

Ms. Bender: Right. I cannot say that my closing will be less than a half hour based upon the fact that obviously my client as the Claimant has the burden and I want to make sure that I meet the burden in the closing argument.

Mr. Blohm: Sure . . . it's already 4:00. It looks like it's going to be awfully tight to

get in both closing arguments today, unfortunately.

Mr. Rau: I prefer that they both be done on the same day.

Mr. Blohm: We'll probably have to ask the NASD to schedule another half day.

Ms. Bender: Do people by any chance have their calendars here to be able to . . because that can shortcut I think about a month off the process, it's been my experience.

OFF THE RECORD

BACK ON THE RECORD

Mr. Blohm: Claimant and Respondent have both concluded. Closing arguments will be presented on the 16th of this month. The NASD will confirm the time and place but tentatively we set it for 8:00 in the morning on the 16th. That's the end of this tape.

Exhibit F

MAUN&SIMON, PLC

SAINT PAUL OFFICE

2300 WORLD TRADE CENTER
30 EAST 7TH STREET
SAINT PAUL, MINNESOTA 55101-4904
TELEPHONE 612-229-2900
TELECOPIER 612-229-2800

MINNEAPOLIS OFFICE

2900 NORWEST CENTER
90 SOUTH SEVENTH STREET
MINNEAPOLIS, MINNESOTA 55402-4133
TELEPHONE 612-338-1113
TELECOPIER 612-338-2271

REPLY TO: St. Paul

June 14, 1994

VIA FACSIMILE AND UNITED STATES MAIL

Sharon A. Kranz, Esq.
Staff Attorney
National Association of
Securities Dealers, Inc.
20th Floor
10 South LaSalle Street
Chicago, IL 60603-1002

Re: NASD Arbitration No. 93-02443

Dear Ms. Kranz:

Respondents rested last Thursday. It has, however, come to our attention through additional inquiry at the NASD that the central issue in this case - namely a broker/dealer's obligation to fill out a U-5 - is an issue upon which the NASD

itself has significant interest. This letter serves as a formal request by the Respondents to reopen the record and to request that the arbitrators, pursuant to Section 33 of the NASD Code of Arbitration and 9 U.S.C. Section 7 subpoena Mr. Craig Landauer of the NASD's general counsel's office. We would request that Mr. Landauer appear by telephone Thursday morning at 8:00 a.m. o'clock, CST. Both Section 33 and 9 U.S.C. Section 7 provide subpoena power to self-regulatory organizations to direct testimony. Mr. Landauer is knowledgeable as to the obligations of broker/dealers in connection with filling out both U-4 and U-5 forms.

Thank you for your anticipated cooperation and I hope that this does not cause any inconvenience for anyone. For your information, I do not believe Mr. Landauer's testimony will be lengthy.

Yours very truly,

s/s

Steven E. Rau

SER:bss
Enclosures
cc: Rebecca Bender, Esq. (via facsimile)
Craig Landauer, Esq. (via facsimile)
John Feltl
Albert A. Woodward, Esq.

6/1494,SER,53422_18

Exhibit G

REBECCA E. BENDER & ASSOCIATES, P.A.

Minnesota Law Center
514 Nicollet Mall - Suite 570
Minneapolis, Minnesota 55402-1021

Telephone (612) 332-6220
Facsimile (612) 332-4728

June 14, 1994

VIA TELEFAX AND MAIL

Sharon A. Kranz, Esq.
Staff Attorney
National Association of
Securities Dealers, Inc.
Arbitration Office
20th Floor
10 South LaSalle Street
Chicago, Illinois 60603-1002

Re: Honn v. R.J. Steichen and Company, et al.
NASD Case No. 93-02443

Dear Ms. Kranz:

This letter serves as a response to the June 14, 1994 letter from Steven E. Rau, counsel to the Steichen Respondents in this action. I received Mr. Rau's letter via telefax at 3:58 p.m. today.

As you know, in Mr. Rau's letter, he seeks to reopen the record which, by agreement of all parties, was closed last Thursday, June 9, 1994, except for the closing arguments

which are to proceed on June 16, 1994 at 8:00 a.m. Mr. Rau is apparently asking the arbitrators to subpoena Mr. Craig Landauer of the NASD to testify in this hearing, despite the fact that the parties agreed to close all evidence last week.

Though I would have had no objection to Mr. Landauer (or any other expert) testifying when the record was still open (if he had been timely identified by Respondents), I must object to this belated attempt by the Steichen Respondents to call an expert witness. There are three major problems with Mr. Rau's belated request:

1. If in fact Mr. Landauer is subpoenaed by the arbitration panel, claimant will have a right to rebut Mr. Landauer's testimony, if appropriate. Recently, at the Securities Industry Association Conference in Palm Dessert, a representative of the National Association of securities Dealers specifically stated that not all misrepresentation and suitability claims need be disclosed on a U-5 Form. Rather, Article III, Section 2 of the NASD Rules of Fair Practice sets forth examples of the types of claims which are considered to be "fraud" claims. Should Mr. Landauer be subpoenaed by the panel and testify in any way differently from the other NASD representative, I would need to get a copy of the Securities Industry Association tapes from that day, determine who the NASD representative was who spoke, and request that the panel subpoena that gentleman to testify, as well. In other words, though Mr. Rau states he does not believe Mr. Landauer's testimony will be lengthy, Claimant, without hearing Mr. Landauer's testimony, cannot assume that he would not call former NASD Assistant District Director Charles Fath (who previously testified in this

action), and/or the NASD representative who spoke at the SIA conference as rebuttal witnesses.

2. Charles Fath, a former Assistant District Director for the National Association of Securities Dealers, Inc. testified in this action, supporting Claimant's claim for defamation, stating, inter alia, that the Blaz Counterclaim should never have been disclosed (as it is based on an indication of interest) and that the Blaz Counterclaim should have been investigated by Steichen prior to their deciding whether to list it on the Form U-5. The panel was active in asking additional questions of Mr. Fath. Even Respondents' counsel, Mr. Rau, asked Mr. Fath a variety of questions. It is my understanding that the panel is not presently confused as to the standard for disclosing customer complaints on Forms U-5 and the requirement to timely amend Form U-4's.

3. Pursuant to the NASD Code of Arbitration Procedure, Claimant served Requests for Documents and Information upon R.J. Steichen's counsel last year. In the Responses to those Requests, Steichen specifically stated that if it intended to call any expert in the arbitration in this action, it would disclose the name of such expert ten days prior to the hearing date, in accordance with NASD Code of Arbitration Procedure Section 32(c). Not ten days prior to the arbitration hearing, nor one day prior to the arbitration hearing, did the Steichen Respondents identify any expert. Rather, they are apparently attempting to now get the arbitration panel to subpoena an expert for them, as they apparently did not previously anticipate how compelling the testimony of Claimant's experts would be. However,

what takes place during the course of an arbitration cannot and should not justify breaking the rules of the forum. (Mr. Rau has already attempted to introduce a document which had not been produced in response to Claimant's Document Requests. The panel disallowed this document from being introduced.)

Claimant Brian Honn has a right to have this dispute determined in an efficient manner. When Respondents signed their Uniform Submission Agreements, they agreed to abide by the arbitration rules of the National Association of Securities Dealers. Plain and simple, Respondents seek to break those rules, and cause a delay in the proceedings, on the eve of the closing arguments. This type of behavior should not be permitted.

Very truly yours,

s/s
Rebecca E. Bender

REB/tt

cc: Steven E. Rau, Esq. (via telefax)

NASD Arbitration

National Association of Securities Dealers, Inc. • 20th Floor • 10 South LaSalle Street
Chicago, IL 60603-1002 • 312-899-4440 FAX 312-236-9239

June 15, 1994

Rebecca E. Bender, Esq.
Minnesota Law Center
514 Nicollet Mall
Suite 570
Minneapolis, MN 55402-1021

Subject: NASD Arbitration Number 93-02443
Brian L. Honn vs. R.J. Steichen and Company and
John E. Feltl

Dear Ms. Bender:

Steven Rau's Motion To Reopen the record is granted. The panel has agreed to sign the subpoena for Craig Landauer which should be prepared and forward to the NASD, Attention Sharon A. Kranz.

If you have any questions, please do not hesitate to call.

Very truly yours,

s/s
Sharon A. Kranz, Esq.
Staff Attorney
312-899-4440

Copy: Al Woodward
Steven Rau
SAK:MLT:LC53A

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

Brian L. Honn,

Claimant,

SUBPOENA TO GIVE TESTIMONY

v.

NASD Case No. 93-02443

R.J. Steichen and Company,
John E. Feltl and John Does,

Respondents.

TO: Craig L. Landauer, Senior Attorney, Office of the General Counsel, National Association of Securities Dealers, Inc., 1735 K Street N.W., Washington, D.C. 20006.

PLEASE TAKE NOTICE, that pursuant to the Rules of the National Association of Securities Dealers, Inc., you are hereby ordered to appear at the hearing via telephone in the above-referenced action to give testimony relative to the cause at issue. The undersigned will initiate the telephone contact with you.

Unless excused by the undersigned counsel to Respondents, you are required to appear via telephone on the morning of June 16, 1994 at 8:00 a.m. central standard time.

A failure to appear at the time noted, without being excused prior to that time, may result in your being held in contempt of court.

If you have any questions regarding this subpoena, please contact the undersigned.

Dated: June 15, 1994

MAUN & SIMON, PLC

s/s

Steven E. Rau (#147990)
2300 World Trade Center
Saint Paul, Minnesota 55101-4904
612-229-2900
COUNSEL FOR RESPONDENT
R. J. STEICHEN AND COMPANY

6/15/94,SER,53523_18

Exhibit I

EXHIBIT J

Partial Transcript of Arbitration Hearing from June 16, 1994, Reopening of Evidence for Hearing and Beginning of Craig Landauer Testimony

Mr. Blohm (Arbitration Chairperson): This is the case of Brian Honn v. R.J. Steichen and John Feltl. Prior to the hearing today Mr. Steven Rau, the attorney for the Respondents, requested that the panel of arbitrators allow Respondents to call by telephone conference Mr. Landauer of the NASD for additional testimony. The panel after considering the request of Mr. Landauer [sic] and the submissions of counsel for the Claimant Ms. Bender, has previously ruled that Mr. Landauer may be called by telephone conference provided that Ms. Bender is given an opportunity if she so elects to continue the proceeding in order to allow rebuttal witnesses to be called. And so on that . . . with that condition, the request of Mr. Rau was granted. Mr. Rau, do you have anything to add to that?

Mr. Rau (Counsel to Steichen Respondents): The only thing I have to add is simply this: my original request to Ms. Kranz of the NASD was to ask this panel to subpoena

Mr. Landauer pursuant to the panel's powers. Yesterday afternoon I received a phone call and talked to Ms. Kranz and she told me that this panel had decided to hear Mr. Landauer's testimony. At that point in time I was not in my office and I prepared a subpoena and had it served on Mr. Landauer by fax yesterday afternoon. I don't have a copy of it with me here today even.

Ms. Bender (Counsel to Brian Honn): I do.

Mr. Rau: You do and I simply want to report the events to the panel since then. I received word from my office late yesterday afternoon. Mr. Landauer called my office and advised someone that he may not be available this morning. In discussing the matter with Ms. Kranz she advised me that Mr. Landauer's, one of his children, has become ill and he wasn't sure if he would be available, that Mr. Flood who is in the NASD's General Counsel's Office would do everything he could to make Mr. Landauer available. I called Mr. Landauer's office this morning. He had not yet arrived. I've been advised that it would be best to call after 9:15 Eastern Standard Time with that proviso and with whatever counsel to Claimant has to say. I will try to contact Mr. Landauer.

Ms. Bender: Sure. As Mr. Rau stated, the request which he made to have Mr. Landauer testify would have been in response to a panel subpoena. His request was never that the Respondents would directly subpoena Mr. Landauer. I think that is important because I am interested in knowing whether Mr. Landauer is going to be appearing at the panels' request or at Mr. Rau's request. At the present time I only have the subpoena signed by Mr. Rau. The reason why I think among other reasons that this is important is that in addition to the parties having agreed on the record that all of the evidence was in and that we would be here this morning solely for closing arguments, also in the Response to Requests for Information, under the NASD Code of Arbitration Procedure, Mr. Rau stated that he would provide the names, home addresses, business addresses and business phone numbers for any and all expert witnesses and identify the subjects about which they will opine and a brief statement of their opinions and the bases for these opinions ten days prior to the hearing as required under NASD Code Section 3 2 (c). If this is in effect an expert being called by Mr. Rau, this is contrary not only to his statement that all the evidence was in and that Respondents had rested, but also is contrary to the Respondents' Responses to Claimant's Request for Information which

is already introduced as Claimant's Exhibit 22.

Mr. Blohm: Alright. Your comments are noted and are part of the record. I should observe that the panel granted Mr. Rau's request with the understanding that Mr. Rau is requesting the right to call Mr. Landauer to further his client's case, not at the panel's request. And that if Mr. Rau chose to do so, that the Claimant would be given a full opportunity to present rebuttal witnesses if Claimant so elected . . . . The panel's desire to get as much testimony on the subject matter . . .

Ms. Bender: I understand then and appreciate and understand the panel's ruling now, that it was in effect to allow Mr. Rau on behalf of the Respondents to call Mr. Landauer, not necessarily the panel's request, but allowing Mr. Rau to do so.

. . .

Mr. Blohm: Alright. We're back on the record.

Mr. Rau: Back on the record. Mr. Landauer, first I'd like to thank you. I understand that this is an inconvenience for you. You have some personal issues which made your appearance today pursuant to subpoena difficult. For your information, this is NASD Arbitration No. 93-002443 and I am here with Rebecca Bender who is

counsel for the Claimant Brian Laron Honn. Ms. Sharon Kranz or is it Kraanz of the NASD Chicago Office is here and Arbitrator Kaiser, Blohm and Frankman are here. And with that being said would you please state your name and spell it for the record.

Craig Landauer of the NASD: Before I do that I have B.G. Brooks here who is in our office of general counsel.

Mr. Rau: Is that B.G. Brooks? Is Ms. Brooks appearing as counsel for you sir?

Mr. Landauer: Yes.

Mr. Rau: Yes. So you are presented today, correct?

Mr. Landauer: Yes.

Mr. Rau: Okay.

Mr. Landauer: I am represented in my capacity as an employee of the NASD.

Mr. Rau: Okay. Thank you.

Ms. Bender: This is Rebecca Bender, Mr. Landauer. We left messages for each other but we've never had the opportunity to speak in person. Just for clarification, the subpoena which you are testifying pursuant to today has been issued by Mr. Rau who just spoke to you from the Maun & Simon firm,

rather than the panel. And I just wanted to put that on the record and make sure that we're all operating under the same understanding that you are appearing pursuant to the subpoena of a party in this arbitration.

Mr. Landauer: That's right And I would also like to say that the NASD is taking no position with respect to the validity of this particular subpoena.

NOTICEABLE SILENCE

Mr. Rau: Fine.

Mr. Blohm: That's fine. It's on the record.

. . .

Exhibit K

REBECCA E. BENDER & ASSOCIATES, PA.

Minnesota Law Center
514 Nicollet Mall - Suite 570
Minneapolis, Minnesota 55402-1021

Telephone (612) 332-6220
Facsimile (612) 332-4728

October 7, 1994

John Pinto
Executive Vice President
National Association of Securities
Dealers, Inc.
1735 K Street, N.W.
Sixth Floor
Washington, DC 20006

Dear Mr. Pinto:

As I am presently representing broker-dealers, brokers and investors in numerous NASD pending arbitration matters, I am seeking clarification of one matter. How would I go about arranging for an NASD employee, such as regional counsel, assistant district administrator or an NASD representative who has drafted a particular notice to members to testify in my clients' private arbitration proceedings?

I would think that by calling an NASD representative, my clients (whoever they are) would have a definite advantage before the arbitrators. As I am not fully aware of the connection between the NASD Administrative offices and the Code of Arbitration Procedure which permits the issuance of

subpoenas to any third parties, I would appreciate your assistance in this regard.

Very truly yours,

s/s
Rebecca E. Bender

REB/tt

Exhibit K

REBECCA E. BENDER & ASSOCIATES, P.A.

Minnesota Law Center
514 Nicollet Mall - Suite 570
Minneapolis, Minnesota 55402-1021

Telephone (612) 332-6220
Facsimile (612) 332-4728

October 25, 1994

John Pinto
Executive Vice President
National Association of Securities
Dealers, Inc.
1735 K Street, N.W.
Sixth Floor
Washington, DC 20006

Dear Mr. Pinto:

This letter serves to follow up on my October 7, 1994 letter to you. As I have not heard back from you, I am enclosing a courtesy copy of that letter.

I would appreciate hearing from you at your earliest convenience, due to the number of NASD arbitrations which I have presently pending and my desire to provide the best possible representation for my clients.

Thank you in advance for your prompt attention to this matter.

Very truly yours,

s/s
Rebecca E. Bender

REB/tt

NASD

National Association of
Securities Dealers, Inc.
1735 K Street, N.W.
Washington, D.C. 20006-1506
(202) 728-8000

October 28, 1994

Ms. Rebecca E. Bender
Rebecca E. Bender & Associates, P.A.
Minnesota Law Center
514 Nicollet Mall, Suite 570
Minneapolis, MN 55402-1021

Dear Ms. Bender:

In your recent letter to John Pinto, you mentioned that you represented certain clients in numerous NASD arbitration proceedings and you asked how you would go about arranging for an NASD employee, such as regional counsel, assistant district administrator or an NASD representative who has drafted a particular notice to members to testify in your clients' private arbitration proceedings.

The NASD has a long-standing policy not to provide staff persons as so-called "expert" or "technical witnesses" in private civil litigation or in arbitration proceedings. Various reasons support this policy, including the overwhelming burden on the NASD staff if such testimony were provided, given the thousands of NASD arbitration proceedings each year. Moreover, our policy is identical to that of other self-regulatory organizations and administrative agencies, such as the Securities and Exchange Commission.

I regret that we are unable to assist you in this regard.

Very truly yours;

s/s
William R. Schief
Vice President
Regional Attorneys/Enforcement

WRS/zkf

Exhibit L

Deiter, Stephens & Durham

Economic and Financial Consultants

Exhibit M

Financial Losses

in the matter of

Brian Honn,
Claimant,

versus

R.J. Steichen & Co. & John Feltl,
Respondents.

Prepared by:
John C. Deiter, Ph.D.
Financial Economist
June 7, 1994

A-118

Deiter, Stephens & Durham
Economic and Financial Consultants

Deiter Consulting Group, Inc.
John C. Deiter, Ph.D.
Stephen E. Durham, Ph.D.
Cynthia D. Stephens, Ph.D.

First Union Center
Suite 1470
100 South Ashley Drive
Tampa, Florida 33602
Phone (813) 223-7644
Fax (813) 223-7866

May 27, 1994

Ms. Rebecca Bender
Rebecca E. Bender & Associates, P.A.
Minnesota Law Center
514 Nicollet Mall
Suite 570
Minneapolis, Minnesota 55402-1021

RE: Brian Honn

Dear Ms. Bender:

Pursuant to your request, we have analyzed the relevant data and information necessary to prepare a preliminary valuation of the financial implications of the erroneous U-5 report on Brian Honn by R. J. Steichen & Company, Inc. It is our opinion that the present value of financial losses to Mr. Honn from lost past wages and diminution of future earning capacity, assuming he continues employment in the securities industry, range from *$559,000* to *$910,000*. If Mr. Honn is unable to continue employment in the securities industry, the diminution of future earning capacity losses range from *$1,148,000* to *$1,501,000*. Additionally, the financial losses incurred during Mr. Honn's employment with R. J. Steichen & Co. due to disputed commissions, lack of training and charges to Mr. Honn's account total *$42,300*.

A brief synopsis of our valuation analysis follows. The total and present value of the economic losses are attached on the accompanying tables.

VALUATION ASSUMPTIONS

WORKLIFE

Brian Honn, born February 19, 1966, will work until his 62nd birthday.

NORMAL EARNING CAPACITY - **Registered Securities Sales Representative**

Mr. Honn began his employment at R. J. Steichen & Company in March of 1992 and resigned in April of 1993, at that time the erroneous U-5 form was submitted. Based on Mr. Honn's wage earning history and the information published by Securities Industry Association, we have established a range for Mr. Honn's normal earning capacity for 1994 to be from $72,500 to $116,000.

Assuming continuation of employment as a registered securities sales representative, Mr. Honn's future earnings are projected to grow at an annual rate of 6.67%.

CURRENT EARNING CAPACITY

Mr. Honn's current earning capacity has been predicated on the opinion of Ms. Mary Calhoun, Securities Consultant/Expert. Ms. Calhoun has opined that assuming Mr. Honn can continue to be employed in the securities industry as a registered representative, his future earnings will be reduced by 25% to 50%. Alternatively, he may not be able to continue his career due to the erroneous U-5. In the later case, Mr. Honn will most likely return to his pre-securities

industry occupation as a product salesman. Mr. Honn's 1994 current earning capacity is projected to range from a high of $87,000 down to $24,000 per year, depending upon the cumulative effect of the erroneous U-5 to his career.

Future annual wage earnings are projected to grow at an annual rate of 6.67%.

PRESENT VALUE

Future economic losses are reduced to present value by employing a 7.21 % discount rate. This rate reflects current risk-free interest rates.

VALUATION CONCLUSIONS

The conclusions stated above were determined in accordance with generally accepted valuation methodology and meet the test of reasonable economic certainty.

The opinion is subject to change in the event that the following occur:

1. Any material change in current risk-free interest rates.

2. Any material change in the valuation date of June 7, 1994.

If you have any questions, or require any additional information, please contact us.

Thank you for the opportunity to assist you and your client.

Cordially,
DEITER, STEPHENS & DURHAM

s/s
John C. Deiter, Ph.D.
Financial Economist

Enclosures

BRIAN HONN
Summary of Losses: Post-Termination Registered Representative: 25% Reduction SIA:

	Total Value	Present Value
Past Losses		
April 24, 1993 through June 7, 1994		
Past Losses: 1992-1993	$42,300	$42,300
Total Past Losses	$42,300	$42,300
Future Losses		
June 8, 1994 through February 18, 2028		
Pre-Termination Earning Capacity	$8,735,000	$2,237,100
Post-Termination Earning Capacity	6,551,200	1,677,800
Future Difference	$2,183,800	$559,300
Total	**$2,226,100**	**$601,600**

BRIAN HONN
Summary of Losses: Post-Termination Registered
Representative: 25% Reduction Current

	Total Value	Present Value
Past Losses		
April 24, 1993 through June 7, 1994		
Past Losses: 1992-1993	$42,300	$42,300
Pre-Termination Earning Capacity	$50,300	$50,300
Post-Termination Earning Capacity	37,800	37,800
Past Losses: 1994	$12,500	$12,500
Total Past Losses	$54,800	$54,800
Future Losses		
June 8, 1994 through February 18, 2028		
Pre-Termination Earning Capacity	$14,015,100	$3,589,200
Post-Termination Earning Capacity	10,511,300	2,691,900
Future Difference	$3,503,800	$897,300
Total	**$3,558,600**	**$952,100**

BRIAN HONN

Summary of Losses: Post-Termination Sales Representative

	Total Value	Present Value
Past Losses		
April 24, 1993 through June 7, 1994		
Past Losses: 1992-1993	$42,300	$42,300
Total Past Losses	$42,300	$42,300
Future Losses		
June 8, 1994 through February 18, 2028		
Pre-Termination Earning Capacity	$8,735,000	$2,237,100
Post-Termination Earning Capacity	4,254,600	1,089,600
Future Difference	$4,480,400	$1,147,500
Total	**$4,522,700**	**$1,189,800**

BRIAN HONN

Summary of Losses: Post-Termination High School Graduate

	Total Value	Present Value
Past Losses		
April 24, 1993 through June 7, 1994		
Past Losses: 1992-1993	$42,300	$42,300
Total Past Losses	$42,300	$42,300
Future Losses		
June 8, 1994 through February 18, 2028		
Pre-Termination Earning Capacity	$8,735,000	$2,237,100
Post-Termination Earning Capacity	2,875,300	736,400
Future Difference	$5,859,700	$1,500,700
Total	**$5,902,000**	**$1,543,000**

Brian Honn: Earnings History

Age	Year	Actual Earnings
23	1989	$18,437
24	1990	12,578
25	1991	0
26	1992	4,285
27	1993	79,025

Brian Honn: Past Financial Losses at R. J. Streichen & Co.

Value of lost training	$21,230
Dealer charges deducted from commissions	8,180
Eltrax/Balz losses	7,720
Monies deducted from personal account	2,730
Additional earned unpaid commissions	2,440
Total	$42,300

Brian Honn: Pre-Termination Earning Capacity

1994 Annual Earning Capacity: SIA Standard	$72,473
1994 Annual Earning Capacity: Current	$116,281
Earnings Growth	6.67%
Discount Rate	7.21%

	Present Value
SIA Standard	
Past Losses: 1992 - 1993	$42,300
Future Earnings: 6/8/94 - 2/18/28	2,237,100
Total: SIA Standard	$2,279,400
Current	
Past Losses: 1992-1993	$42,300
Past Earnings: 1/1/94-6/7/94	50,300
Future Earnings: 6/8/94 - 2/18/28	3,589,200
Total: Current	$3,681,800

Brian Honn: Post-Termination Earning Capacity (A)

1994 Annual Earning Capacity: SIA Standard	$54,354
1994 Annual Earning Capacity: Current	$87,211
Earnings Growth	6.67%
Discount Rate	7.21%

	Present Value
SIA Standard	
Future Earnings: 6/8/94 - 2/18/28	$1,677,800
Total: SIA Standard	$1,677,800
Current	
Past Earnings: 1/1/94-6/7/94	$37,800
Future Earnings: 6/8/94 - 2/18/28	2,691,900
Total: Current	$2,729,700

(A) 25% reduction of pre-termination earning capacity.

Brian Honn: Post-Termination Earning Capacity (B)

1994 Annual Earning Capacity	$35,300
Earnings Growth	6.67%
Discount Rate	7.21%

	Present Value
Future Earnings: 6/8/94- 2/18/28	$1,089,600
Total	$1,089,600

(B) Manufacturer and Wholesale Sales Representative (general)

Brian Honn: Post-Termination Earning Capacity (C)

1994 Annual Earning Capacity	$23,856
Earnings Growth	6.67%
Discount Rate	7.21%

	Present Value
Future Earnings: 6/8/94 - 2/18/28	$736,400
Total	$736,400

(C) Male high school graduate working year-round, full-time

	Present Value
Past Financial Losses at R. J. Steichen	$42,300
Past Lost Earnings	
January 1, 1994 - June 7, 1994: Current	$12,500
Future Lost Earning Capacity: June 8, 1994 - February 18, 2028	
(A) 25% Reduction: SIA Standard	$559,300
25% Reduction: Current	$897,300
(B) Sales Representative (General)	$1,147,500
(C) Male High School Graduate	$1,500,700
Total Lost Earning Capacity (A): SIA	$601,600
Total Lost Earning Capacity (A): Current	$952,100
Total Lost Earning Capacity (B)	$1,189,800
Lost Earning Capacity (C)	$1,543,000

JOHN C. DEITER, PH.D.

PROFESSIONAL CONSULTING ECONOMIST

Valuation studies for investment decisions, mergers, securities offerings, estate planning, tax questions, ownership disputes, divorce, financial reorganizations, analysis of operating practices in commercial banking and savings institutions and appraisals of economic and financial losses. Qualified as an expert economist in the United States Federal Tax Courts of Florida, United States District Courts of Florida, United States District Courts of Alabama, Circuit Courts of Louisiana, and Florida Circuit Courts.

EDUCATION

Post-Doctoral Studies in Applied Economics Analysis and Monetary Policy, 1968, University of Chicago, Chicago, Illinois.

Ph.D., 1965, Case Western Reserve University, Cleveland, Ohio (Economics, Money and Banking, Business Cycles and Forecasting, Finance and Marketing).

M.B.A., 1958, Indiana University, Bloomington, Indiana (Business Economics).

B.S.B.A., 1957, University of Akron, Akron, Ohio (General Business and Accounting).

ACADEMIC AWARDS AND HONORS

Undergraduate and Graduate Degrees with Distinction.
Omicron Delta Epsilon, Honorary Society in Economics.

Beta Delta Psi, Honorary Society in Business Administration.
Beta Gamma Sigma, Honorary in Economics.

ASSOCIATION MEMBERSHIPS

Southern Finance Association
Southern Economics Association
National Association of Business Economists
American Economics Association

UNIVERSITY EXPERIENCE

University of South Florida, Tampa, Florida, Associate Professor, Finance and Economics, 1965-1981.
Guest Lecturer, Stetson University Law School, St. Petersburg, Florida.

EXECUTIVE EXPERIENCE

Deiter Consulting Group, Tampa, Florida, Chairman
John C. Deiter & Co., Tampa, Florida, President
Deiter, James & Franklin Co., Tampa, Florida, Partner
Allen & O'Hara, Inc., Memphis, Tennessee, Managing Partner
B.F. Goodrich Co., Akron, Ohio, Economist
Southeastern Medical Services Corp., Tampa, Florida, President

CURRENT RESEARCH

Economic losses compared to jury awards in personal injury and wrongful death litigation.

Periodic instead of lump sum payments in medical malpractice suits and other tort actions.

Measures of labor and capital productivity in monopolistic industries.

PUBLICATIONS/SCHOLARLY PAPERS

"Measuring Response Errors in Sample Surveys", Publication pending.

"Operating Cost Characteristics, Florida Skilled Care Nursing Homes", 1973, Health and Rehabilitative Services, State of Florida.

"Development of Multivariate Regression Formulas for Nursing Home Operating Cost Prediction", 1973, Health and Rehabilitative Services, State of Florida.

"Insider Trading Related to Common Stock Prices", Southern Journal of Business, July, 1967.

"Moonlighting and the Short Weekend", Quarterly Journal of the Southwest Social Science Association, December, 1966.

"Economics of the Short Weekend", edited for Business Week, December, 1964.

"Forecasting and Financial Planning", American Management Association, 1965.

"Insider Trading and Forecasting Investment Values in the Stock Market", Southern Finance Association, 1966.

"Growth Trends in the U.S. Economy and the Role of Higher Education", University of South Florida Foundation Association, 1967.

"Application of Cost Benefit Principals to Financial Problems Involving Water Pollution and the Evaluation of Dredge and Fill Proposals", Southeast Water Management Conference, 1969.

"Monetary Policy and Interest Rates, 1969-70 Outlook", Florida Society of Comptrollers, 1969.

DWD AD
DW /FIS I/SCR LABOR S
10/12 WSJ Dean Witter Ordered to Pay Fired Manager

By Michael Siconolfi

NEW YORK - - Brokerage firms will receive more than a slap on the wrist if found to have falsified data about a manager's termination, The Wall Street Journal reported.

That's the message in a widely watched defamation case involving Dean Witter, Discover & Co. An arbitration panel ordered Dean Witter to pay $1.5 million to a former branch manager, who contends he was fired for refusing to condone illegal activities by the firm's brokers, and who says he was defamed on his termination notice, known as a "U-5."

The decision, which included $750,000 in punitive damages, is the second-largest defamation award levied against a brokerage firm, industry executives said. In a highly unusual action, the National Association of Securities Dealers panel also recommended the NASD investigate whether to further discipline Dean Witter.

"There's a very strong message here - - don't fiddle with those U-5s," says Samantha Rabin of the Securities Arbitration Commentator, a Maplewood, N.J., newsletter. These so-called U-5s are part of the brokers' permanent record of employment in the securities business.

Dean Witter said it was "very disappointed" with the award, and will "move to vacate it." But arbitration cases are difficult to overturn. Typically, reversals are granted only in the case of egregious behavior by arbitrators.

The case was filed in 1991 in Nashville, Tenn., by John Glennon Jr., formerly branch manager of Dean Witter's Nashville office. Glennon says he was fired from his branch

manager position in August 1990 because he "refused to condone - - and, instead, reported and sought to eliminate - - illegal activities" at Dean Witter's Nashville office, according to the arbitration papers.

Among those activities, Glennon alleged, were brokers forging customer signatures. When he questioned one broker on the forgeries, Glennon says in papers filed with arbitrators, the broker responded: "What's the big deal? That's the way things have always been done around here."

Dean Witter denies there were any forgeries or illegal activity at the Nashville branch.

Glennon was demoted to a stock salesman, he says in the arbitration papers - - slashing his annual pay from about $150,000 to $60,000 plus commissions. But in October 1991, Dean Witter fired Glennon from the sales position "because he had refused to pay Dean Witter amounts it allegedly had overpaid him."

In November 1991, Dean Witter filed a U-5 with the NASD, in which it answered "yes" to the question: "Currently is, or at termination was, the individual under internal review for fraud or wrongful taking of property, or violating investment-related statutes, regulations, rules or industry standards of conduct?"

Glennon, in papers filed with arbitrators, says Dean Witter "is seeking to exact revenge by permanently damaging his reputation in the securities industry" because of his refusal to condone the allegedly illegal activities by Dean Witter brokers.

The NASD panel ordered Dean Witter to change the U-5 to "correct the false statement" by saying that Glennon's termination was due to a "dispute over compensation."

Jeffrey Liddle, of Liddle, O'Connor, Finkelstein & Robinson, Glennon's attorney, says the decision "is a clear vindication of Glennon's efforts to clean up the Dean Witter Nashville branch and to be free from libel, slander and disparagement as a consequence of his efforts."

(END) DOW JONES NEWS 10-12-93
6 19 AM

Exhibit O

CASE TYPE: MISREPRESENTATION/
DEFAMATION/CONTRACT

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Claimant/Plaintiff, Court File No. CT94-015904

v. **AFFIDAVIT OF BRIAN L. HONN**

R.J. Steichen and Company and
John E. Feltl,

Respondents/Defendants.

STATE OF MINNESOTA)
)ss.
COUNTY OF HENNEPIN)

I, Brian L. Honn, being first duly sworn under oath, states and alleges as follows:

1. I am the Plaintiff in the above-captioned action, which seeks to vacate the arbitrators' decision in an arbitration sponsored by the National Association of Securities Dealers, Inc. (hereinafter "NASD"). (The NASD Arbitration system is similar to and performs the same functions as a court system.) This affidavit supports only one of the three bases for my motion to vacate the arbitrators' award.

2. I am presently working at Principal Financial Group, Inc. (formerly Craig-Hallum/Hamilton Investments) as a registered representative broker.

3. Under the rules of the NASD (which licenses me to sell securities), I was required to arbitrate my dispute against my former employer, NASD brokerage firm member R.J. Steichen and its president/owner, John E. Feltl, before the NASD.

4. Brokerage firms, like defendant R.J. Steichen, are members of the NASD. Individual brokers, like myself, are licensed by the NASD, but are not members of the NASD.

5. Under the NASD Rules, I was not allowed to have my dispute against my former employer heard in court, or before a jury or in any arbitration forum other than that of the NASD.

6. I previously believed that the NASD arbitration system, like a court system, was geared to provide an impartial decision-making forum to brokers who had disputes with their former employers (brokerage firms).

7. Pursuant to the NASD Code of Arbitration Procedure, the arbitration panel deciding the case was made up of three individuals, two persons not affiliated with the securities industry and one person, James Kaiser, a former Paine-Webber manager who was designated by the NASD as still being affiliated with the securities industry.

8. On June 16, 1994, when I was in attendance at the arbitration hearing (which took place from June 7-9 and June 16, 1994), the arbitrators took a break from the proceedings taking place in the Lake Harriet Room at the Marquette Hotel in Minneapolis.

9. During that break, right outside of the Lake Harriet Room, I overheard Sharon Kranz, the Chicago NASD Case Administrator, a NASD employee, talking in confidence to James Kaiser, the securities industry arbitrator on the panel deciding my case.

10. Ms. Sharon Kranz, who I believe to be equivalent to a judge's law clerk, asked Mr. Kaiser, one of the arbitrators (equivalent to a jury member), if he knew of any jobs for her in the law department of a securities firm. Ms Kranz went on to state to Mr. Kaiser that she would like to leave her position at the NASD and to work in a compliance/legal capacity at a brokerage firm.

11. Mr. Kaiser, who is paid to decide arbitration matters impartially, was being asked by a representative of the supposed impartial sponsoring entity to help her find a job in the securities industry! Mr. Kaiser replied that he would keep his eyes open for opportunities for Ms. Kranz of the NASD and would let her know if he heard of anything.

12. I could not imagine a judge's law clerk approaching a member of a jury seeking employment from him or requesting another favor.

13. I understood that it was one of the primary roles of the NASD Case Administrator (Sharon Kranz), when she attends hearings in person, to see to it that no favors are requested or granted by the persons deciding a case. As a NASD attorney and source person in responding to the panel's questions, I also thought that the NASD Case Administrator (Sharon Kranz) must be an impartial source of information who owes nothing to the industry or its members (one of whom, R.J. Steichen, I was suing).

14. I believe there is too close of a professional connection between the NASD Case Administrator and the arbitration panel deciding the dispute for favors to be requested and/or granted between the industry-run forum (NASD) and the industry panelist (Mr. Kaiser) when I am required by the industry to have my dispute against an industry member (R.J. Steichen) arbitrated in an NASD proceeding.

FURTHER YOUR AFFIANT SAITH NOT.

s/s
Brian L. Honn

Subscribed and sworn to before
me this 17 day of November, 1994.

s/Nancy S. Banz
Notary Public

My commission
expires 2-18-98

CASE TYPE: MISREPRESENTATION/
DEFAMATION/CONTRACT

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Claimant/Plaintiff, Court File No. CT94-015904

v. **PROPOSED ORDER**

R.J. Steichen and Company and
John E. Feltl,

Respondents/Defendants.

On December 15, 1994, at 9:00 a.m., this Court heard the Plaintiff's Motion to Vacate Arbitrators' Award pursuant to Minn. Stat. § 572.19 and 9 U.S.C. § 10 and Defendants' Motion to Confirm the Arbitration Award. Rebecca E. Bender appeared as counsel to Plaintiff Brian L. Honn. Steven E. Rau appeared as counsel to Defendants R.J. Steichen and Company and John E. Feltl.

Based upon all of the pleadings and exhibits submitted by both parties, as well as the argument of counsel at this hearing, the Court makes the following order:

1. Plaintiff Brian Honn's Motion to Vacate the Arbitrators' Award pursuant to Minn. Stat. § 572.19 and 9 U.S.C. § 10 is hereby granted, as the award was procured by corruption, fraud or other undue means, as there was evident

partiality or misconduct prejudicing the rights of a party and as the arbitrators exceeded their powers.

2 . This arbitration matter is remanded to the New York City Arbitration Office of the National Association of Securities Dealers, Inc., Attention: Deborah Massuci, Director of Arbitration, so that this matter may be handled out of the New York City Office of the NASD, with out-of-state arbitrators appointed to decide this matter when it is heard again, so as to avoid further prejudice to Mr. Honn.

3. Attorneys' fees, costs and expenses incurred by Mr. Honn in bringing this Motion to Vacate are ordered to be paid by Respondents to Mr. Honn, within seven days, in the amount of $4,805.00.

IT IS SO ORDERED.

BY THE COURT:

Dated:_____

_____

Delila F. Pierce
Hennepin County District Court Judge

CASE TYPE: MISREPRESENTATION/
DEFAMATION/CONTRACT

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Claimant/Plaintiff, Court File No. CT94-015904

v.

R.J. Steichen and Company and John E. Feltl,

BRIAN HONN'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO VACATE ARBITRATORS' AWARD

Respondents/Defendants.

I. INTRODUCTION

This Reply Memorandum serves solely to correct the misstatements of fact and law contained within the R.J. Steichen Defendants' Memorandum in Opposition to Brian Honn's Motion to Vacate the Arbitrators' Award. Though Steichen's quotations from historical figures and fables is entertaining, its statements concerning the applicable law and the bases for Mr. Honn's Motion to Vacate are flat out wrong and potentially misleading to this Court.

II. ARGUMENT

A. There is No Requirement That an Entire Transcript be Provided to a Reviewing Court Under These Circumstances.

Steichen's counsel cites to Pyle v. Securities U.S.A., Inc., 758 F. Supp. 638 (D. Colo. 1991), allegedly for the proposition that courts are allowed to refuse to vacate an NASD award where a broker "did not provide the full transcript of the proceeding." The Pyle case stands for no such broad principle. Rather, in that case, the court held on a very limited issue, namely that when a motion to vacate was based upon the arbitrators acting in manifest disregard of the law (which is not a basis for Mr. Honn's Motion to Vacate in this matter), the court would have needed to examine the record of the arbitration proceeding.

In Pyle, contrary to Steichen's representations in this matter, no portion of the transcript was provided to the court to decide whether there had been manifest disregard of the law. As this Court is aware, in the case at bar, the portions of the transcript which deal with the issues forming the bases for Mr. Honn's Motion to Vacate have been provided to the Court. Even Defendant Steichen cannot refute this fact.

B. Mr. Honn's Motion to Vacate is Being Brought in a Timely Manner.

Once again, Steichen's Memorandum has the potential of misleading this Court through its inaccurate case law analysis. Steichen's counsel has a habit of making a statement of law and then citing to cases which do not support that statement.

For example, the Steichen Defendants state that Mr. Honn's attempt to raise the issue of bias or partiality (which, as this Court knows, are not the sole bases for Mr. Honn's

Motion), is untimely and therefore "improper." (See Steichen Memorandum pp. 11-12.) As support for this theory, Steichen cites to Drexel Burnham Lambert, Inc. v. Pyles, 701 F. Supp. 217 (N.D. Ga. 1988). However, that case did not hold as the Steichen Defendants claim.

In that case, the party seeking to vacate the award had waited longer than the three-month period after the award was filed or delivered to file his motion to vacate. Steichen knows full well that under the Federal Arbitration Act and Minnesota's Uniform Arbitration Act, Mr. Honn was timely in filing and serving his Motion to Vacate, having done so within the required three-month period.

Steichen's counsel certainly also knows that Minn. Stat. 572.16, which provides a mechanism by which a party can apply to the panel to modify or correct an award, does not preclude a party, such as Mr. Honn, from filing a Motion to Vacate, within three months of the award, when prejudice, bias and misconduct are at issue The reasons for this are obvious: a panel and a process which are flawed and unfair cannot be corrected by the very arbitrators and the very forum which allowed the bias, prejudice and misconduct to take place.[1]

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[1] The other two cases cited by the Steichen Defendants in their attempts to rewrite the Federal Arbitration Act and Minnesota's Uniform Arbitration act with respect to the three-month time line within which one may bring a motion to vacate, namely Fort Hill Builders v. National Grange Mut. Ins., 866 F.2d 11 (1st Cir. 1989), and Cook Industries, Inc. v. C. Itoh and Company, 449 F.2d 106 (2d Cir. 1971), are also not on point. In Fort Hill, supra, the improper conduct of one arbitrator forming the basis for the motion to vacate consisted of comments throughout the arbitration by an arbitrator, which everyone was aware of throughout the hearing and which could have been corrected. In Cook, supra, both parties' contacts with the employer of one of the arbitrators, Cargill, were well known by the parties at the time of the submission to arbitration. In the case at bar, not until October 28, 1994, when the NASD sent a

C. The Affidavits Submitted in Support of Honn's Motion to Vacate are Wholly Proper.

Steichen refers to the Affidavit of Honn's counsel as containing "rank speculation." To the contrary, the exhibits attached to Bender's Affidavit are confirmed by the highest levels of the National Association of Securities Dealers, Inc. (See William Schief letter at Exhibit L.)

It is indeed ludicrous that the Steichen Defendants are also apparently urging that rather than Mr. Honn testifying via affidavit concerning the conversation which he overheard between an arbitrator and an NASD administrator (equivalent to a judge's law clerk), that perhaps Mr. Honn should have contacted the arbitrator involved to draft an affidavit (which would have been contrary to the NASD Code of Arbitration), or that Mr. Honn should have contacted the NASD administrator, Sharon Kranz, to ask her to submit an affidavit concerning her wrongdoing!

Despite Steichen's characterizations of the Affidavits, these Affidavits are not similar to those Steichen refers to in Itasca County Social Service v. Milatovich, 381 N.W.2d 497 (Minn. App. 1986) or City of Duluth v. PFL, 431 N.W.2d 135 (Minn. App. 1988). Both Affidavits are made on personal knowledge, Bender's Affidavit is supported by an independent source (William Schief) and the other attachments to it, and the information in both Affidavits would be admissible into evidence.

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letter to Honn's counsel, Bender, indicating that NASD employees do not testify as expert witnesses in private arbitration hearings, was the bias, prejudice and misconduct fully known.

D. Whether the Steichen Defendants Wish to Admit it or Not, Craig Landauer was an Expert Witness Called on Their Behalf.

There are many indications of the fact that Craig Landauer, Associate General Counsel of the NASD who testified as Steichen's expert witness was just that, i.e., an expert witness. The following key facts are ignored by Steichen in its response Memorandum:

1. Craig Landauer had no factual knowledge concerning the claims or defenses raised in this matter. He was not a participant in any of the actions forming the basis for this arbitration, directly or indirectly. He was solely called to testify as an expert witness.

2. The failure by Steichen to identify their intention to call Mr. Landauer of the NASD was not solely a violation of Section 32(c) of the NASD Code of Arbitration Procedure, which requires parties to identify witnesses whom they intend to call. Under Section 32(a) of the NASD Code of Arbitration Procedure, parties are allowed to serve Requests for Documents and Information. In the December 20, 1993 Requests of Brian Honn, responded to by Steichen on March 30, 1994, Steven Rau did not object to Honn's Request for Information No. 2 requesting names, home addresses, business addresses and business phone numbers for any and all expert witnesses and [to] identify the subjects about which they will opine and a brief statement of their opinions and the bases for these opinions. Rather, Steichen agreed to provide this information "ten days prior to the hearing."

3. As set forth in Exhibit J to the Bender Affidavit, Craig Landauer was testifying voluntarily on Steichen's behalf, as he admitted, under oath, that the NASD was not opining on the validity of the subpoena provided to him via telefax the day before by Steven Rau, counsel to the Steichen Defendants.

4. Whether or not Mr. Landauer had "all the attributes of an expert witness," as Steichen's counsel believes those attributes to be, is irrelevant. Mr. Landauer had no direct factual information concerning this dispute, he was solely offering opinion testimony and the subpoena under which he was arguably appearing was invalid. In other words, if he offers opinions like an expert, and talks like an expert and appears voluntarily like an expert, he is an expert.

5. Under Minnesota law, when an individual is truly being subpoenaed to testify, he must be paid, at a minimum, witness fees, or the subpoena is invalid. The fact that no witness fees were paid and the fact that Landauer admitted that the subpoena was not valid, is additional support for the fact which Steichen does not want to admit, namely that the NASD's Landauer served as an advocate for its member firm R.J. Steichen.

E. <u>The Fact that NASD Panels have Previously Made Awards to Parties Suing Broker-Dealers is Irrelevant</u>.

The Steichen Defendants claim that were the NASD a biased forum, no awards would be made by NASD arbitrators against broker-dealers. Honn's counsel could not agree more. As Honn's counsel Bender stated in Honn's Memorandum in Support of Motion to Vacate, this arbitration was indeed an unusual one. Honn's counsel Bender is not meaning to imply that the NASD process is flawed in all circumstances. However, based upon the facts as set forth in the Affidavits and attachments previously submitted, the NASD process <u>in this matter</u> and the conduct of the arbitrators <u>in this case</u> was indeed flawed.[2]

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[2] It is interesting to note that both of the cases cited by Defendants in which brokers were successful in alleging defamation against broker-dealers involve false allegations concerning the wrongful

F. There is Nothing in the NASD Code of Arbitration Procedure which Undermines the Reach of the Federal Arbitration Act or Minnesota's Uniform Arbitration Act.

Steichen attempts to argue that Section 35 of the NASD Code of Arbitration Procedure, which allows the arbitrators to make certain interpretations of NASD Code provisions, somehow undermines the reach of Minn. Stat. § 572.19, which provides a number of bases under which "the court shall vacate" arbitrators' awards. Suffice it to say, no case or court has similarly interpreted Section 35.

G. The Bases for this Motion to Vacate are Certainly Not Speculative or Remote.

The Steichen Defendants provide a number of cases in which the bases for a Motion to Vacate were indeed speculative and remote. Such is not the case here. For example, in one case cited by the Defendants, an expert witness perjured himself as to his credentials. Peabody v. Rotan Mosle, Inc., 677 F. Supp. 1135 (M.D. Fla. 1987). In another case cited by the Steichen Defendants, the party bringing a Motion to Vacate based his motion in part on the fact that one of the panel members "allegedly possessed a negative opinion of [one of the parties]." Atlantic Shores Resort Joint Venture v. Martin, 731 F. Supp. 1279 (D.S.C. 1990). This case is a far cry from those allegations.

Perhaps most likely to be misinterpreted is the Steichen Defendants' cite to Konkar Mar. Ent. v. Compagnie Belge D'Affretement, 668 F. Supp. 267 (S.D.N.Y. 1987), which is

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taking of property by the broker. Though it is beyond the scope of this Motion to Vacate, there were not similar allegations in the case at bar.

cited by Steichen for the proposition that speculation cannot warrant vacatur of the award. Despite the fact that the letter from the NASD's William Schief, alone, brings this matter far beyond the realm of speculation, it is important when judging the credibility of Steichen's response Memorandum to look at what the Konkar court actually said. In that case, the panel had allowed the setting up of an escrow account prior to receiving respondents' opposition brief. Respondents argued that this indicated that the panel had judged the merits of the dispute before hearing the case. In that case, under those circumstances, the courts stated, "Such speculation is clearly insufficient to warrant vacatur of the award." Id. at 275.

Clearly, the case at bar is raising issues wholly different from the Konkar case. However, one of the holdings in Konkar, namely that when a party to an arbitration does not receive a full and fair hearing on the merits, the district court will not hesitate to vacate the award, is a lesson which we can bring to the instant case.

H. The Steichen Defendants Cleverly Fail to Focus on All of the Bases for Honn's Motion to Vacate.

Steichen's counsel cites to cases which have ruled on motions to vacate based on claims of factual or legal error by an arbitrator. Admittedly, the standard of review in such a situation is narrow. This is not a basis for Mr. Honn's claims.

To the contrary, there are four primary bases for Mr. Honn's Motion to Vacate, set forth in Minn. Stat. § 572.19, which range from the fact that the award was procured by corruption, fraud or other undue means; that there was evident partiality by an arbitrator or corruption in any of the arbitrators or misconduct prejudicing the rights of a party; or the arbitrators exceeded their powers; or the arbitrators conducted the hearing in a way to prejudice the rights of a party. Steichen apparently focuses wholly on the issue of

evident partiality, ignoring the other issues of corruption, misconduct, actual bias and prejudice. However, one need only review the cases cited by Steichen's counsel to see that the issues in the case at bar are much more egregious and much more dangerous to a fair hearing. Whether an arbitrator and counsel for a party to a proceeding had a remote contact years before as in Safeco Insurance Company v. Stariha, 346 N.W.2d 663 (Minn. App. 1984), is small potatoes compared to this case.

On the other hand, the Eagan and Sons Company v. Mears Park Development Company, 414 N.W.2d 785 (Minn. App. 1987) case cited by the Steichen Defendants is potentially helpful to this Court. Though only dealing with an issue of impermissible contacts in that case, the court found that a party to an arbitration does not waive its statutory right to contest an arbitration award when an arbitrator fails to disclose a potential conflict. Citing to Northwest Mechanical, Inc. v. Publicly Utilities Commission of City of Virginia, 283 N.W.2d 522, 524 (Minn. 1979), the court held that impermissible contacts . . . are dealings, even if not producing any actual prejudice, where such dealings might create an impression of possible bias as the phrase is used in Commonwealth Coatings Corp. v. Continental Casualty Company, 393 U.S. 145 (1968).

III. CONCLUSION

The Steichen Defendants claim that Mr. Honn's arguments consist of smoke, mirrors and shadows. To the contrary, Mr. Honn is not required to use such techniques, as he has concrete facts, even from an officer of the National Association of Securities Dealers, Inc., which indicate that what took place in the Honn v. Steichen arbitration, whether called corruption, undue means, prejudice, bias or misconduct, is sufficient for this Court to vacate the arbitrators' award.

Despite Steichen's statements to the contrary, Steichen knows that Mr. Honn is not seeking "an elaboration or interpretation of [the arbitrators'] language." Mr. Honn is seeking a fair and impartial forum for his dispute to be heard.

Mr. Honn respectfully requests that this Court examine the substantive evidence previously submitted to it and make its determination of Mr. Honn's motion based upon these facts, rather than Defendants' mischaracterization of the facts and the law. It is not surprising that the Steichen Defendants could find no case similar to the case at bar. Fortunately for the NASD and fortunately for the courts which are required to determine motions to vacate, there has, in all likelihood, never been such an amazingly biased, corrupt and prejudiced hearing.

Dated: December 9, 1994

s/s

REBECCA E. BENDER & ASSOCIATES, P.A.
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ATTORNEYS FOR PLAINTIFF
BRIAN L. HONN

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

Rebecca E. Bender, being duly sworn, deposes and says that on the 9th day of December, 1994, she served Brian Honn's Reply Memorandum in Support of Motion to Vacate Arbitrators' Award upon Defendants' counsel of record in this matter, by mailing a copy thereof in the United States mail, postage prepaid, directed to Respondents' attorney at his last known address, as follows:

Steven E. Rau, Esq.
701 Fourth Avenue South
Suite 500
Minneapolis, Minnesota 55415.

s/s
Rebecca E. Bender

Subscribed and sworn to before me
this 9th day of December, 1994.

s/ Janice Murray
Notary Public

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Plaintiff, **ORDER AND MEMORANDUM**
File No. CT 94-15904

v.

R.J. Steichen and Company
and John E. Feltl,

Defendants.

The above-entitled matter came on for hearing before the Honorable Delila F. Pierce, one of the judges of the above-named court, on the 15th of December, 1994, on Plaintiff's motion to vacate arbitrators' award and Defendants' motion to confirm arbitration award at the Hennepin County Government Center, Minneapolis, Minnesota.

Rebecca E. Bender, Esq. appeared for and on behalf of Plaintiff; Steven E. Rau, Esq. appeared for and on behalf of Defendants.

Now, therefore, based on the files, records and proceedings and the arguments of counsel:

IT IS HEREBY ORDERED:

1. Plaintiff's motion to vacate the arbitrators' award pursuant to Minn. Stat. §572.19 and 9 U.S.C. §10 is granted.

2. This arbitration matter is remanded to the New York City Arbitration office of the National Association of Securities Dealers, Inc., Attention: Deborah Massuci, Director of Arbitration. Non-Minnesota arbitrators shall be appointed to decide this matter upon rehearing.

3. Plaintiff's request for attorneys' fees is granted in the amount of $300.00.

4. Defendant's request for attorney's fees is denied.

5. The attached Memorandum is incorporated herein and made a part of this order.

BY THE COURT:

Dated: January 20, 1995.

s/s
Delila F. Pierce
Judge of District Court

MEMORANDUM

Facts

This matter comes before the Court on Plaintiff's motion to vacate the arbitrators' decision in the National Association of Securities Dealers, Inc. (NASD) arbitration captioned Brian L. Honn v. R.J. Steichen and Company and John E. Feltl, NASD Case No. 9302443, and on Defendants' motion to confirm same.

Plaintiff, a securities broker, brought an action against his former employer, R.J. Steichen and Company (R.J. Steichen), a brokerage firm, and its president/owner John E. Feltl, for defamation, breach of contract and misrepresentation, after Plaintiff had voluntarily left the employment of R.J. Steichen.

Brokers are required, under the Rules of the NASD, to have their claims decided by an NASD arbitration panel. Therefore, the case was heard by a panel of arbitrators appointed by the NASD. The NASD panel awarded Plaintiff $7312.50 together with prejudgment interest against Defendants.

Defendants allege that Plaintiff's discontent with the award is the underlying reason for his motion to vacate the decision and re-litigate his claims. Defendants contend that Plaintiff availed himself of all of the advantages of arbitration until Plaintiff received an award with which he was dissatisfied. Defendants also claim that at the end of the arbitration, all parties agreed that they had received a fair and impartial hearing on the issues. Defendants contend that because Plaintiff has received a fair hearing, this Court should confirm the NASD arbitrators' award.

Plaintiff, however, argues that the arbitration proceeding was unfair. Plaintiff contends that the arbitrators' award was procured by corruption, fraud or other undue means. In addition, Plaintiff claims that there was evident partiality and misconduct which affected the hearing. Finally, Plaintiff

claims that the NASD arbitrators exceeded their power, and thus prejudiced his rights. Plaintiff urges the court to vacate the NASD arbitrators' decision under Minn. Stat. §572.19.

The Law

There is a strong policy in Minnesota favoring arbitration, and judicial intervention has been carefully circumscribed. Deebout v. St. Paul Fire & Marine Ins. Co., 365 N.W.2d 271, 173 (Minn. Ct. App. 1985). Minnesota encourages arbitration as a speedy, informal and relatively inexpensive procedure for resolving disputes. Ramsey County v. AFSCME Council 91 Local 8, 309 N.W.2d 785, 789 (Minn. 1981).

However, Minn. Stat. §572.19 provides that under certain circumstances, a court is required to vacate an arbitration award. Minn. Stat. §572.19 provides in pertinent part:

> Upon application of a party a court shall vacate an award where:
>
> 1. The award was procured by corruption, fraud or other undue means;
>
> 2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> 3. The arbitrators exceeded their powers; or
>
> 4. The arbitrators so conducted the hearing, contrary to the provisions of Section 572.12, as to prejudice substantially the rights of a party.

Minn. Stat. §572.19.

The Minnesota statutory section is modeled after 9 U.S.C. §10 of the Federal Arbitration Act. 9 U.S.C. §10 provides in relevant part:

> In any of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:
>
> 1. Where the award was procured by corruption, fraud or undue means;
>
> 2. Where there was evident partiality or corruption in the arbitrators, or either of them;
>
> 3. Where the arbitrators were guilty of misconduct. . . in any misbehavior by which the rights of any party have been prejudiced; or
>
> 4. Where the arbitrators exceeded their powers.

9 U.S.C. §10. Any one of these individual findings is sufficient, in and of itself, to vacate the arbitrators' award.

The standard of judicial review of arbitration procedures is whether a party to an arbitration has been denied a fundamentally fair hearing. See Baar v. Tigerman, 140 Cal. App. 3rd 979 (Cal. 1983).

The test to be applied is that of a reasonable person. More specifically, an arbitration award must be vacated upon a finding of "evident partiality," which exists "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." Local 814 Internat'l Bd. of Teamsters v. J & B Installer & Moving, Inc., 878 F.2d 38, 40 (2nd Cir. 1989). Courts should consider the totality of the circumstances in deciding the existence of

evident partiality. U.S. v. International Broth. of Teamster, 814 F. Supp. 1165 (S.D.N.Y.).

Discussion

Plaintiff argues that the award should be vacated since Craig Landauer, an NASD official, was allowed to testify on behalf of the Defendants as an expert witness.

Defendants raise the argument that Landauer was not, in fact, an expert witness. This court disagrees. Mr. Landauer appeared voluntarily and had no direct factual information concerning this dispute. Rather, Mr. Landauer was solely offering his opinion testimony. Therefore, Mr. Landauer is considered an expert witness.

Allowing an NASD employee to testify as an expert on behalf of the Defendants in an NASD proceeding, where NASD selects the arbitrators to hear a particular dispute, presents at the very least, bias and prejudice. Plaintiff equates this to having one judge sitting in a courtroom, calling in a judge from the courtroom next door to provide some testimonial insight for the jury, while indicating that it is the defendants in the case which have called the judge to testify. The Court agrees.

Allowing an NASD official to testify on behalf of Defendants places Plaintiff at an extreme disadvantage before the arbitration panel. Clearly, admitting such testimony raises questions both as to the fairness of this proceeding and whether or not the NASD arbitrators may have had a difficult time disagreeing with a NASD employee.

Furthermore, because of Plaintiff's counsel's concern regarding the activities in this arbitration proceeding, counsel contacted William R. Schief, an NASD Vice President in charge of Regional Attorneys/Enforcement. Plaintiff's counsel received an official response regarding the validity of this testimony from Schief. In that letter, Schief stated that "[t]he NASD has a longstanding policy not to provide staff persons

as so-called expert or technical witnesses in private litigation or in arbitration proceedings."

This letter makes clear that the NASD does not approve of its employees testifying in arbitration matters. In this case, the NASD overstepped their own policies and rules. The court therefore finds that allowing an NASD official to testify in the arbitration proceeding was unfair and therefore prejudiced the Plaintiff.

Plaintiff's also contend that the proceeding was corrupted by the NASD coordinator requesting a job from the securities industry panelist, James Kaiser, a former Paine-Webber manager.

The arbitration proceeding at issue concerned misrepresentation, defamation and breach of contract and thus in accordance with the NASD Rules, two persons not affiliated with the securities industry and one person designated as an affiliate of the securities industry, were chosen to decide the dispute between the parties.

Apparently, during a break in the arbitration hearing, Sharon Kranz, the Chicago NASD Case Administrator was talking to James Kaiser, the securities industry arbitrator on the panel. Kranz, a representative of the impartial sponsoring entity, was discussing with Kaiser whether Kaiser knew of any jobs for her in the securities industry.

It is the duty of the NASD Case Administrator (Kranz) to see that the hearings are conducted in an impartial manner. it therefore follows that she must be an impartial source of information owing nothing to the industry. Clearly, there is too close of a professional connection between the NASD Case Administrator and the arbitration panel deciding a dispute for favors to be requested of a panel member.

Such behavior, while not directly related to the subject matter of the arbitration at issue, does, however, lend itself to the appearance of impropriety and thus undermines the necessary impartiality required in arbitration proceedings.

For the foregoing reasons, the Court finds that the arbitration proceeding failed to allow Plaintiff a fundamentally fair hearing. The proceeding lacked the necessary impartiality required of an arbitration panel and thus prejudiced Plaintiff's rights. Therefore, the Court must grant Plaintiff's motion to vacate the arbitrators' award pursuant to Minn. Stat. §572.19 and 9 U.S.C. §10 and deny Defendants' motion to confirm same.

DFP

STATE OF MINNESOTA
IN COURT OF APPEALS

R.J. Steichen and Company
and John E. Feltl,
Petitioners,

v.

Brian L. Honn,
Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR DISCRETIONARY REVIEW

District Court File No.: CT 94-015904

I. INTRODUCTION

Respondent Brian Honn ("Honn") is responding to the Petition for Discretionary Review, as the Petition mischaracterizes, the Judge's Order and mischaracterizes the evidence offered at the District Court level in support of Honn's Motion to Vacate.

In addition, counsel to Petitioners have failed to attach copies of Honn's Memorandum in Support of Motion to Vacate, with 15 supporting exhibits and two affidavits, as well as failing to produce to this Court Honn's Reply Memorandum, which deals with many of the same issues being raised in the Petition.

II. ARGUMENT

A. Petitioners mischaracterize Judge Pierce's Order

1. Petitioners erroneously claim that Judge Pierce did not make "Findings of Fact."

This argument consists of merely form over substance. Anyone who reads the six-page Memorandum of Judge Pierce is able to see that the opinion is replete with "Findings of Fact." The mere failure to separate out the findings under a heading titled "Findings of Fact" is not the basis for an appeal as of right or for a discretionary review of a District Court's Order. Under the Discussion section of Judge Pierce's Memorandum, which proceeds from pages four through six of that Memorandum, the Court, inter alia finds that (1) Craig Landauer was an expert witness; (2) allowing an NASD employee to testify as an expert on behalf of one of the parties in an NASD proceeding where the NASD selects the arbitrators to hear a particular dispute presents at the very least bias and prejudice; (3) allowing an NASD official to testify on behalf of one party placed the other party at an extreme disadvantage before the panel; (4) the NASD overstepped its own policies and rules which do not allow its employees to testify in arbitration matters; (5) allowing an NASD official to testify in the arbitration proceeding was unfair and prejudicial to Honn; and (6) the NASD Case Administrator requesting a job from the Securities Industry arbitrator on the panel undermined the necessary impartiality required in arbitration proceedings.

2. Petitioners erroneously claim that Judge Pierce used a new standard for determining this Motion to Vacate.

Once again, a review of the record in Judge Pierce's Decision shows otherwise. On Page 2 of the Judge's Memorandum, the Court cites to what it believes to be the relevant portions of Minn. Stat. 572.19, which include:

- (1) That the award was procured by corruption, fraud or other undue means;

(2) There was evident impartiality by an arbitrator appointed . . . or corruption in any of the arbitrators or misconduct prejudicing the rights of any parties;

(3) The arbitrators exceeded their powers; or

(4) The arbitrators so conducted the hearing to prejudice substantially the rights of a party.

Though the Steichen Petitioners would prefer that this Court solely found that there was "evident partiality," to thereby limit the Judge's opinion, the opinion itself is speaking more loudly than any mischaracterization of that Opinion is able to do.

Clearly, when the Court held that allowing an NASD employee to testify as an expert on behalf of a party in a NASD proceeding "presents at the very least, bias and prejudice," the Court is referring to the language in Minn. Stat. § 572.19, (2) and (4). In addition, when the Court holds that admitting such testimony "raises questions both as to the fairness of the proceeding and whether or not the NASD arbitrators may have had a difficult time disagreeing with an NASD employee," the Court is referring to Minn. Stat. 572.19, Sections (1), (2) and (4).

Finally, when the Court states that Mr. Honn was denied a fundamentally-fair proceeding, what better way to characterize Minn. Stat. § 572.19, section 4, which refers to conduct "prejudicing substantially the rights of a party" or Minn. Stat. § 572.19 (2) last phrase, which refers to "misconduct prejudicing the rights of any party."

B. Petitioners mischaracterize the evidence offered at the District Court level.

As Petitioners' counsel is well aware, Honn did not merely offer two affidavits in support of his Motion to Vacate. Mr. Honn offered 15 exhibits (Exhibits A through O) which were part of the District Court record and which are being provided herewith as a courtesy, along with Honn's lower court Memoranda.

In addition to the 15 exhibits, there were two affidavits offered. Briefly, Mr. Honn's Affidavit is not hearsay, as under Rule 801 of the Rules of Evidence, hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted." Mr. Honn was testifying solely regarding a conversation between the securities arbitrator on the panel and the NASD Case Administrator (Kranz). This conversation was not offered to prove the truth of the matter asserted, namely that the NASD officer Kranz was, in fact, looking for a job outside of the NASD. Therefore, it is not hearsay.

As a practical matter, it is ludicrous for the Steichen Petitioners to apparently recommend that Mr. Honn should have contacted the NASD administrator Kranz to ask her to submit an affidavit concerning her wrongdoing or that Mr. Honn should have contacted the arbitrator involved to draft an affidavit (which would have been contrary to the NASD Code of Arbitration Procedure).

In addition, the Bender Affidavit, like the Honn Affidavit, is made on personal knowledge. Bender's Affidavit is supported by an independent source, NASD official William Schief, at Exhibit L (and the other attachments to the Affidavit).

III. CONCLUSION

Despite how Petitioners may attempt to characterize Honn's Motion to Vacate, there is much more here than the evident partiality of arbitrators acting in manifest disregard of the law, which was the situation in the cases cited by the Steichen Petitioners. Petitioners disagree with the factual findings of the Court and, therefore, claim that this is sufficient basis for discretionary review of this record. The District Court's Order makes specific reference to the strong policy in Minnesota favoring arbitration. However, in this case, the District Court properly found that under Minn. Stat. § 572.19, the Court was required to vacate the arbitration award, as several of the individual findings in Minn. Stat. § 572.19 were made.

The only thing that would be unfair here would be to further delay the rehearing of this arbitration in a forum and in front of arbitrators whose conduct does not prejudice the rights of a party (Minn. Stat. § 572.19 (2) and (4)). Respondent Honn respectfully requests that this Court deny the Petition for Discretionary Review.

Dated: February 24, 1995

s/s

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ATTORNEYS FOR RESPONDENT HONN

STATE OF MINNESOTA

IN COURT OF APPEALS

Brian L. Honn,

Respondent,

ORDER

vs.

C5-95-256
C2-95-392

R.J. Steichen & Company, et al.,

Appellants (C5-95-256),
Petitioners (C2-95-392).

Considered and decided by Crippen, Presiding Judge, Randall, Judge, and Peterson, Judge.

BASED UPON THE FILE, RECORD AND PROCEEDINGS, AND FOR THE FOLLOWING REASONS:

Appellants filed a direct appeal (C5-95-256) from a January 20, 1995 order vacating an arbitration award and directing a rehearing. This court questioned jurisdiction. Both parties submitted memoranda, and appellants filed a petition for discretionary review (C2-95-392). Respondent opposes the petition.

The January 20 order vacating the award is not appealable as of right, because it directs that the case be resubmitted to a new arbitration panel. See Minn. Stat. § 572.26, subd. 1(5)

(1994); Metropolitan Airports Comm'n v. Metropolitan Airports Police Federation, 443 N.W.2d 519, 523 (Minn. 1989). We decline to construe Minn. Stat. § 572.26, subd. 1(3) as allowing an appeal from any order denying confirmation of an award because it appears the legislature intended to limit appeals from orders vacating awards to situations where no rehearing is directed. See Minn. Stat. § 645.17(2) (1994) (presumption that the legislature intends the entire statute to be effective and certain).

Appellants argue that Minn. Stat. § 572.26, subd. 1(5) is preempted by the Federal Arbitration Act (FAA) because the FAA allows an appeal from an order vacating an award, regardless of whether a rehearing is directed. See 9 U.S.C.A. § 16(a)(1)(E) (West Supp. 1994). We hold that the FAA does not control the process by which substantive rights pertaining to arbitration are reviewed in state court. See Xaphes v. Mowry, 478 A.2d 299, 301 (Me. 1984); Batton v. Green, 801 S.W.2d 923, 930 (Tex. App. 1990).

Appellants have not established a compelling reason for review of the January 20 order. See Mivoi v. Gold Bond Stamp Co. Employees Retirement Trust, 293 Minn. 376, 378, 196 N.W.2d. 309, 310 (1972) (declining to grant discretionary review where nonappealable arbitration order did not expose the aggrieved party to irreparable damage).

IT IS HEREBY ORDERED:

1. The direct appeal (C5-95-256) is dismissed.
2. The petition for discretionary review (C2-95-392) is denied.
3. The Clerk of the Appellate Courts shall provide copies of this order to the Honorable Delila F. Pierce, counsel of record, and the court administrator.

Dated: March 7, 1995

BY THE COURT

s/s
Judge Gary L. Crippen

AW/dr

STATE OF MINNESOTA

IN SUPREME COURT

C5-95-256

Brian L. Honn,

Respondent,

vs.

R.J. Steichen & Company, et al.,

Appellants.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of R.J. Steichen & Company, et al. for further review be, and the same is, denied.

Dated: April 27, 1995

BY THE COURT:
s/ A.M. Keith

Chief Justice

ANDERSON, J. took no part in the consideration or decision of this case.